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NOTES OF INDIAN CASES.

Paramanand Doss Chota Doss and Sons *v.* Nannulal Kanji, (1941) 2 M.L.J. 923.

A point, evidently one of first impression involving the impact of the principles of Hindu law on the general law relating to mortgages fell to be decided in this case, where it was held that the manager's power in a joint Hindu family to bind the properties of the family in a proper case by a mortgage would carry with it a power to authorise the mortgagee to sell the property without recourse to Court. Section 69 of the Transfer of Property Act is placed in Chapter IV and does not contain any reservation against its applicability to Hindus. In fact the specific mention in clause (*a*) of sub-section (1), of Hindus, Mahomedans, etc., being outside the purview of its provision, itself suggests that the other clauses of the sub-section are of general application. It follows therefore, that in creating a mortgage over his property it will be competent to a Hindu to confer on the mortgagee a private power of sale. Again it is settled law that where there is need for raising money for family purposes it is entirely for the manager to decide whether he shall do so by a mortgage of family property or by sale thereof, see *Niamat Rai* v. *Din Dayal.*[1] The question then will be whether in a case where the manager of a joint family decides to mortgage family property he can *qua* manager confer a private power of sale in regard to the mortgaged property. A negative answer might suggest itself for the reason that to hold otherwise would be a violation of the principle that *delegatus non potest delegare.* The reasoning is however fallacious. As stated by Sir Samuel Romilly, M. R., in *Russel* v. *Plaice*[2], with reference to the position of an executor under a will, the power of sale given to a mortgagee must be considered not as the delegation of a power entrusted to the executor which is a power to sell for the benefit of his *cestui que trust* but as the creation of a new power to sell for the benefit of the person interested in the mortgage, that is a power to render the mortgage effectual, and that such power is incidental to the authority to mortgage. The learned Master of the Rolls added in a later decision, *Selby* v. *Cooling*[3], that the insertion of a power of sale in a mortgage usually secures better terms in raising money than otherwise. Thus as founded both in prudence as well as law, the rule has come to be that it is incident to a power to mortgage property to execute a mortgage containing a power of sale, *Bridges* v. *Longman*[4]. The principle having been held to be applicable to executors, a class of persons occupying a fiduciary position, there is no reason why it should not be held equally applicable to other persons occupying a similar position, such as the manager of a joint Hindu family.

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1. (1927) 52 M.L.J. 729: I. L. R. 8 Lah. 597 (P.C.).
2. (1854) 18 Beav. 21: 52 E.R. 9.
3. (1857) 23 Beav. 418: 53 E.R. 164.
4. (1857) 24 Beav 27: 53 E.R. 267.

CHOKKALINGA MUDALI *v.* MANICKA MUDALI, (1942) 1 M.L.J. 11: I.L.R. 1942 M. 448.

This decision holds that a secured creditor who realises his security after an order of absolute discharge in the insolvency of his debtor is entitled under Order 34, rule 6, Civil Procedure Code to a personal decree for the deficiency and is unaffected by the order of discharge. As to the effect of an order of discharge on the rights of a secured creditor there are at least three different views to be found: (1) that the secured creditor is *at all times outside the Insolvency Act* and may obtain a personal decree even if the security has been realised before the passing of the order of discharge, see *Niaz Ahmed* v. *Phul Kunwar*[1], *Sundar Lal* v. *Banarsi Das*[2]; (2) that where a secured creditor realises his security before the mortgagor obtains his discharge, he cannot subsequent to the order of discharge obtain any personal decree, *Haveli Shah* v. *Mt. Hussaina Jan*[3]; (3) that where a secured creditor has ignored the insolvency, he will be debarred from obtaining a personal decree even where the security is realised only after the discharge of the insolvent, *Khupchand Nathmal Marwadi* v. *Rajeshwar Shankar Deshpande*[4], *Athiappa Chettiar* v. *Ibramsa Pulawar*[5]. In view of the conflicting judicial pronouncements an examination of the policy underlying insolvency law and of the relevant provisions of such law and their history may be helpful. The main objects of the insolvency law are that *"all creditors should be entitled to come in and prove and that the bankrupt should emerge from the bankruptcy freed from all his liabilities"*, (per Lord FitzGerald in *Hardy* v. *Fothergill*[6]). His previous liabilities are to be wound up and he is to be given an altogether fresh start, *Heather* v. *Webb*[7]. *Prima facie,* therefore, all debts whether simple or secured are intended to come within the bankruptcy laws. Conformably to this object, section 30 of the English Bankruptcy Act of 1883 has provided that the order of discharge releases the bankrupt from all debts provable under the Act. The early bankrupt laws did not admit to proof any claims for liabilities contingent at the time of bankruptcy. Sections 177 and 178 of the Act of 1849 provided for proof of certain kinds of contingent debts and liabilities. The proof clauses of the Act of 1869 were however expressed in general and comprehensive terms so as to indicate *prima facie* at all events that it was the object of the legislature to discharge the bankrupt from every possible liability. According to section 31 of the Act all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication are to be deemed debts provable in bankruptcy; and liability for purposes of the Act was defined as including "any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement or undertaking whether such breach does or does not occur or is or is not likely to occur or capable of occurring before the close of the bankruptcy and generally any express or implied engagement, agreement or undertaking to pay or capable of resulting in the payment of money or money's worth, whether such payment be, as respects amount fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency; as to mode of valuation capable of being ascertained. The Act of 1883 adopts these and other provisions, though possibly in more vigorous language. In construing the sections of the Act of 1869, Mellish, L.J., said in *Ex parte Llynvi Coal and Iron Co.*,[8] that "it is quite plain that the object of these sections is that the bankrupt shall be absolutely relieved from any liability under any contract he has ever entered into". This view has been approved by Lord Macnaghten in *Hardy* v. *Fothergill*[6], subject to the

1. (1932) I.L.R. 54 All. 428.
2. I.L.R. (1939) All. 492.
3. A.I.R. 1938 Lah. 217.
4. I.L.R. (1940) Nag. 512.
5. (1941) 2 M.L.J. 690.
6. (1888) 13 A.C. 351, 364.
7. (1876) 2 C.P.D. 1, 7.
8. (1871) L.R. 7 Ch. App. 28.

qualification that the value of the liability should not be incapable of being fairly estimated, a case which he characterises is "conceivable but very unlikely to occur". Should such a case occur, if a judicial declaration to that effect is obtained, the liability would stand unaffected by the insolvency and any order of discharge passed therein. Lord Macnaghten further added that except where such a judicial declaration has been made "the liability of the bankrupt under a contract however extreme the difficulty of valuing that liability may be, must be deemed to be a debt provable in bankruptcy and therefore a debt from which the bankrupt is released by the order of discharge"[1]. The liability of a mortgagor for the balance left over after realisation of his security, on his personal covenant, though contingent and incapable of ascertainment at the time of the adjudication would seem according to these principles a debt provable in the insolvency proceedings. The definition in section 2 (*e*) of the Provincial Insolvency Act of a secured creditor, as one holding a mortgage, etc., on the property of the debtor as a security for a debt due to him, fully contemplates the twin rights of the secured creditor, one founded on his security and the other on the debt as being distinct. Under section 28 (2) the entire property of the insolvent vests in the receiver except as otherwise provided by the Act. Section 28 (6) preserves unaffected the power of the secured creditor to "realise or otherwise deal with the security". "Realise" in the context has been held to mean realise by suit, *Official Receiver, Coimbatore* v. *Palanisami Chetty*[2]. The words "or otherwise deal with the security" no doubt cannot be deemed tautologous but that will hardly afford warrant for construing them otherwise than *ejusdem generis*. It is dealing with the security that is spoken of and it can hardly refer to things like an application under Order 34, rule 6, Civil Procedure Code and the view to that effect in *Sundar Lal* v. *Banarsi Das*[3] seems with respect, to be untenable. There is thus nothing in section 28 to preserve to the mortgagee the liability of the mortgagor on the debt unaffected by the insolvency of the mortgagor. The question then will be whether such a liability is a provable debt under the Act. Section 34 which states what debts are provable is taken almost verbatim from the English Acts of 1869 (section 31) and 1883 (section 37), since which time the class of provable debts has embraced almost if not quite all contractual liabilities, per Lindley, L.J., in Re *Browne and Wingrove*[4]. If in *Hardy* v. *Fothergill*[1], a claim founded upon a liability to indemnify a lessee on the part of his assignee in respect of repairs (the extent of the liability being altogether contingent and capable of being known only at the end of the lease which occurred eight years after the bankrupt had been adjudicated insolvent) could be considered provable in the bankruptcy as a liability not incapable of being fairly estimated at the time of the adjudication and as such liable to be washed out by an order of absolute discharge, the argument that until the mortgagee has realised his security he can only guess whether there will be any liability under the personal covenant, and if any, what, and hence the debt is not provable in insolvency loses much of its force. Nor is there any provision in the Insolvency Act excluding a mortgage debt from the category of provable debts. The provisions in section 47 seem to be intended to mark out the courses of action that might be adopted by the mortgagee both with respect to the security as well as the debt. His normal right is to realise his security and then to prove for the balance and until he has realised his security he can oppose the discharge. A Court cannot possibly pass an order of discharge while it was still at large as to what his indebtedness really was. Section 47 (1) provides for proof after realisation and section 33 (3) enables the creditor in certain circumstances to tender proof at any time before discharge. Till the list of the prov-

1. (1888) 13 A.C. 351 at 367.
2. (1925) 49 M.L.J. 203: I.L.R. 48 Mad. 750.
3. I.L.R. (1939) All. 492.
4. (1891) 2 Q.B. 574.

able debts is complete a Court cannot come to the conclusion that the assets of the insolvent amount to eight annas in the rupee and if that cannot be done, section 42 (1) (*a*) prevents a discharge. If the creditor has under section 47 valued his security and subsequently realises it and it is found that the amount realised is not the same as the valuation, then too there is no hardship, for the section allows him to correct the valuation. These provisions taken together suggest that if the mortgagee chooses altogether to ignore the insolvency proceedings then his only right will be to realise the security and no more, and not having elected to prove under section 47, the consequence postulated by section 44 must follow the debt being one provable in the Act according to the principles emerging from the English decisions and statutory provisions, the Indian law being mainly but a replica of the English rules in this respect. In view however of the importance of the question it is to be desired that the conflict would be set at rest either by a pronouncement of a higher tribunal or by legislation.

MUNIAPPA MUDALIAR *v.* KUPPUSWAMI, (1942) 1 M.L.J. 181.

शूद्रस्यानूढायामनियुक्तायामपि सुत एव ।

One begotten by a Sudra on a woman though not married to him or appointed is verily a son. This statement of Medhatithi constitutes the largest recognition of the legal status of an illegitimate son even as 'Manu's description of a son begotten by a Brahmin through lust on a Sudra female as a *parasava* (living corpse) marks the almost complete negation of any status attaching to him *vis a vis* his father. In *Vellayappa Chetty* v. *Natarajan*[1], Sir Dinshaw Mulla has stated that the illegitimate son is a member of his father's family and has the status of a son. Likewise according to Bhashyam Aiyangar, J., in *Ramalinga Muppan* v. *Pavadai Gounden*[2], his position is more analogous to that of a legitimate son than to that of other relations whose right of inheritance was liable to obstruction. In any event it is clear that at best he may for some purposes be deemed to approximate to an aurasa son, but that for no purpose can he rank higher than an aurasa son. In *Venkata Surya* v. *Court of Wards*[3], in repelling the argument that on adopting a son the adoptive father should be deemed to have covenanted not to dispose of his property by will, the Privy Council remarked: "If it were right an adopted son would be in a higher position than a natural son." The inference is irresistible that for any type of son to claim higher rights than an aurasa son in any direction would be preposterous. It is the law that even an aurasa son cannot claim to be maintained by his father after becoming an adult where there is no joint family property, *Prem Chand Pepara* v. *Hoolas Chand Pepara*[4], *Ammakannu* v. *Appu*[5], Manu's text that "The aged parents, the infant children and the chaste wife—these three—are to be maintained even by doing a hundred misdeeds", has always been regarded as authoritative on the limits of the personal obligation of a person to maintain others. No doubt where there is joint family property the illegitimate son will be entitled to maintenance for life, *Ananthaya* v. *Vishnu*[6], *Vellayappa Chetty* v. *Natarajan*[1]. But where there is no joint family property there is no reason why even after ceasing to be an infant the illegitimate son should be held entitled to be maintained by the putative father. Under the Dayabhaga law an adult illegitimate son has no right to maintenance, *Nilmoney Singh Deo* v. *Baneshur*[7]. In *Kuppa* v. *Singaravelu*[8], it was held that the illegitmate son of a Sudra putative father was entitled to maintenance though

1. (1931) 61 M.L.J. 522: L.R. 58 I.A. 402: I.L.R. 55 Mad. 1 (P.C.).
2. (1901) 11 M.L.J. 399: I.L.R. 25 Mad. 519.
3. (1899) 9 M.L.J. (Supp.) 1: L.R. 26 I.A. 83: I.L.R. 22 Mad. 383 (P.C.).
4. (1869) 12 W.R. 494.
5. (1887) I.L.R. 11 Mad. 91.
6. (1893) I.L.R. 17 Mad. 160.
7. (1878) I.L.R. 4 Cal. 91.
8. (1885) I.L.R. 8 Mad. 325.

he was of age. It is however clear that in that case there was joint family property. The decision in the instant case denying the right to an audit illegitimate son to be maintained by his father not possessed of joint family property is one which seems to be in conformity with the principles of Hindu law as well as precedents.

VIYYAMMA *v.* SURYAPRAKASA RAO, (1942) 1 M.L.J. 331: I.L.R. 1942 M. 608.

This case suggests that past unchastity of a widow in itself would not mean that she could not make a valid adoption to her husband years after. Stated in that form, the proposition appears to be rather wide. Efflux of time *per se* cannot wipe off any disqualification engendered by unchastity. Generally the unchastity of a wife operates in Hindu law as an extinguishment of her rights in regard to her husband and his family. A text of Manu cited in the Vivada Ratnakara [Calcutta, Asiatic Society's edition, p. 426], states:

स्वच्छन्दगा च या नारी तस्यास्त्यागे विधीयते ।
न चैव स्रावयं कुर्यात् न चैवाङ्गावकर्त्तन ॥

—"If a woman is licentious her abandonment is ordained; the woman should not however be killed, nor should her limbs be mutilated." And it is settled law that if an unchaste wife or widow becomes penitent she will be entitled at any rate to a starving maintenance, see *Satyabhama* v. *Kesavachari*[1], *Bhikubai Yeshwantrao* v. *Hariba Swalaram*[2], *Sita Devi* v. *Gopal Saran*[3], *Mt. Shibbi* v. *Jodh Singh*[4], *Ram Kumar Dube* v. *Mt. Bhagwanta*[5], *Jeeva Ammal* v. *Ranganatha Mudaliar*[6]. It is true that there is no text of Hindu law postulating that condonation of the wife's infidelity by the husband makes an unchaste wife competent to inherit. If chastity is a condition precedent to a wife's heritable capacity no amount of condonation can wash off the disqualification or remove her spiritual degradation. Nevertheless it is now indisputable that unchastity is no bar to a wife inheriting if it had been condoned by her husband, *Matunginee Dabee* v. *Joykallee Dabee*[7], *Sayamalal Dutt* v. *Saudamini Dasi*[8], *Gangadhar Parappa* v. *Yellu*[9], *Radhe Lal* v. *Bhawani Ram*[10]. Thus under the decisions unchastity of a wife does not reduce her to absolute destitution, nor does it necessarily and always extinguish her right to inherit. Viewed purely from a secular standpoint adoption of a son to the husband by his widow is tantamount to the appointment of an heir to him and *prima facie* unchastity of the widow seems to be immaterial in that connection. Adoption is not however viewed as a secular act merely. It is the spiritual aspect of it that forms the dominant consideration, *Amarendra Man Singh* v. *Sanatan Singh*[11]. Whether an unchaste widow would have the competency to adopt therefore depends on whether the adoption *per se* would be fruitful or infructuous in the matter of procuring spiritual bliss to the deceased husband. The Mahabharata records a conversation between Narada and Arundhati, in the course of which the sage is said to have observed: "O Arundhati, gifts, fastings, religious acts and good acts of unchaste women are in vain. Their religious merits also O spotless beauty are fruitless." This passage indicates that unchastity is not merely destructive of a woman's capacity to act in spiritual matters but that even if she can participate in ceremonies yet her acts will be merely wasted effort in regard to the

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1. (1915) 29 M.L.J. 87: I.L.R. 39 Mad. 658.
2. (1925) I.L.R. 49 Bom. 459.
3. A.I.R. 1928 Pat. 375.
4. (1933) I.L.R. 14 Lah. 759.
5. (1934) I.L.R. 56 All. 392.
6. (1939) 2 M.L.J. 294.
7. (1869) 14 W.R.A.O.J. 23, 30.
8. (1870) 5 Ben.L.R. 362.
9. (1911) I.L.R. 36 Bom. 138.
10. (1917) I.L.R. 40 All. 178.
11. (1933) 65 M.L.J. 203: L.R. 60 I.A. 242: I.L.R. 12 Pat. 642 (P.C.).

accrual of any spiritual benefit therefrom. At the same time there are texts of Hindu law laying down that unchastity if not followed by conception can be expiated[1]. In *Sayamalal Dutt* v. *Saudamini Dasi*[2], it was held that an unchaste widow living in concubinage and being in a state of pregnancy is incompetent to receive a son in adoption. Treating the matter merely as one of ceremonial competency, the Bombay High Court has taken the view that where the unchastity has been expiated or where the parties belong to a community where performance of ceremonies is not needed for a valid adoption, the adoption by an unchaste widow would be valid, *Basavant Mushappa* v. *Mallappa Kallappa*[3]. The learned Judges have however preferred to rest their conclusion on another ground, namely, that a widow having an implied authority to adopt that authority could not be subsequently revoked, the husband being dead at that time, and that any conduct of the widow after the husband's death cannot affect the authority which she acquired or was possessed of at the time of his death. This line of reasoning is open to criticism. If subsequent happenings may revoke the consent given by a sapinda to adopt and subsequent unchastity can cause a forfeiture of a recurring allowance secured to a wife by way of maintenance under a deed, it may well be that a power of adoption whether expressly conferred or impliedly had can be deemed always to be subject to the condition that the repository of the power should continue to remain faithful to her marital vows. That material changes in the circumstances of the family of a deceased person or even lapse of time may revoke a sapinda's authorisation of an adoption has been recognised—see *Suryanarayana* v. *Ramadoss*[4], *Anne Brahmayya* v. *Chelasami Rattayya*[5], *Ammanna* v. *Satyanarayana*[6]. It will be idle to suggest that unchastity of the person through whom an adoption to the deceased is to be made or the futility of such adoption from a spiritual point of view would not be material factors in considering whether a power of adoption given to the widow, be it by the husband or by the nearest sapinda, would continue to subsist or could be exercised at all by her. The question is one which deserves a fuller examination from all aspects.

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1. Yagnavalkya, I, 70—72: Parasara VII-4, X-20; X-26.
2. (1870) 5 Ben.L.R. 362.
3. (1920) I.L.R. 45 Bom. 459.
4. (1918) 34 M.L.J. 87: I.L.R. 41 Mad. 604, 609.
5. (1924) 20 L.W. 503, 517.
6. (1926) 51 M.L.J. 426: I.L.R. 49 Mad. 636, 649.

MUSAMMAT SAHODRA *v.* RAM BABU, (1943) 1 M.L.J. 180 (P.C.).

This decision lays down finally that under the Hindu Law of Inheritance (Amendment) Act II of 1929, the word "sister" includes a half-sister; that if both of them co-exist, the former will exclude the latter on the ordinary principle of Hindu Law that of persons standing in the same degree of descent from the common ancestor whole blood will be preferred to half blood; and that by parity of reasoning the term "sister's son" in the Act will include a half-sister's son also. It is gratifying that these conclusions affirm the views on these matters expressed in the columns of this Journal in (1935) 68 M.L.J. (Jour.) p. 1 at p. 13. In so expounding the law, the Privy Council has rejected the opinion to the contrary regarding the meaning of the term "sister" laid down by a Full Bench of the Allahabad High Court in *Ram Adhar* v. *Mt. Sudeshra*[1], and in certain other decisions in India, and accepted the exposition of the law as found in the Full Bench decision of the Nagpur High Court in *Amrut* v. *Mt. Thagan*[2]. Recently in Madras a Full Bench considered the conflicting views on the matter and held that the word "sister" in section 2 of the Act includes a half-sister, *Papammal* v. *Meenammal*[3]. The decision of the Privy Council in the case under notice had been given exactly one month earlier but was neither known nor available when the Full Bench dealt with the question. That in regard to the construction of the word "sister" the Full Bench should have independently arrived at the same conclusion and on very much the same lines of reasoning is indeed noteworthy.

On another point in the case under review certain remarks fall to be made. In the course of its judgment—(para 2)—the Privy Council starts by saying that the only question for decision was whether the words "sister's son" in section 2 of Act II of 1929 include the son of a half-sister. Para 3 however sets out that the claim of Ram Babu (the plaintiff)—the father's uncle's son of the last male owner Krishna Murari—was resisted by Musammat Sahodra, the half-sister of the propositus, *for herself* and on behalf of her son Dhanpat. On these facts, said to be undisputed, it is obvious that the real question at issue is whether the half-sister would exclude the father's uncle's son. But curiously enough the judgment proceeds to state "when succession opened, these were the two claimants to the estate, *viz.*, Ram Babu and Dhanpat." Surely this is incorrect. There is nothing to indicate that Musammat Sahodra had given up her claim. She was alive and was a contesting defendant and had claimed the property of the last male owner for herself as the nearest heir according to the statement of the claim as set out by their Lordships in an earlier portion of the same para. As between Musammat Sahodra and Dhanpat, under section 2 of the Act as construed by the Board, the former will exclude the latter. It is difficult to see, particularly when their Lordships have recognised in para 4 of their judgment that under the Act the sister's son comes only after the sister, how this point came to be overlooked. This apart, in para 3 of the judgment it is stated that Dhanpat, the half-sister's son died during the pendency of the appeal and their Lordships add: "If Dhanpat, as the son of the half-sister of Krishna Murari was entitled under the Act to inherit the suit property, then Musammat Sahodra as his mother would be entitled to succeed him under the ordinary law." This remark also misses the significance of the fact that under the Act it is Musammat Sahodra that will be the preferential heir and would have taken the property of the last male owner in the first instance and there can be no possibility of a remoter heir like her son taking under the Act first and on his death alone the interest so taken passing to his mother. The statement, however, recurs right through the judgment, and in the penultimate para also it is stated: "In their Lordships' opinion, Dhanpat, the son of the half-sister of Krishna Murari who succeeded to the estate under the Act having died, his mother has under the ordinary law inherited to him."

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1. (1933) I.L.R. 55 All. 725 (F.B.).
2. I.L.R. (1938) Nag. 115 (F.B.).
3. (1943) 1 M.L.J. 1 (F.B.).

JOGENDRA NATH BANERJI *v.* MAKHAN LAL BANERJI, I.L.R. (1942) 2 CAL. 13.

This case illustrates how even where the language of a statute is simple, plain and non-technical it is possible for different views being held regarding its meaning. Section 213 (corresponding to the former section 187) of the Indian Succession Act lays down that " no right as executor or legatee can be established " unless probate has been taken out or letters of administration have been granted in regard to a will. The term "establish" means "set up, secure or place beyond doubt." *Prima facie* it contemplates assertion and action by a person and not his being merely on the defence. Frequently the question has come up whether in a case where a person claims title to the property of a deceased as his heir, it will be competent to another to rely upon a will alleged to have been left by the deceased but which has not been probated to defeat such a claim and whether it will make any difference where the defendant pleads a *jus tertii* only and not any right for himself. Intestacy is the general rule and must be presumed until a will is proved. Is proof, however, of the mere existence of a will and of its genuineness sufficient for the purpose ? Section 30 of the Act states that a person is deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect thereby suggesting that it is the *existence* of a will *capable of being operative* that is needed to negative intestacy and not anything further. This is also consistent with the rulings in *Ford* v. *Ford*[1], and In re *Ford*, *Ford* v. *Ford*[2], that intestacy occurs when no will is left or the will left becomes in-operative. Thus where a will is shown to exist, unless it cannot take effect there is no intestacy. In that view the necessity for probate contemplated by section 213 does not seem to be intended where the will is used only as a shield and not as a sword, only to resist a claim set up by another and not to seek relief under the will. The point has, however, been the subject of conflicting judicial pronouncements, though the decisions are agreed that an unprobated will may be looked into for a wholly collateral purpose, such as to prove a power of adoption (per Anantakrishna Aiyar, J., in *Ganshamdoss* v. *Gulab Bi Bai*[3]), or the status of a person (*Achyutananda Das* v. *Jagannath Das*[4]) or the intention of a holder regarding an estate, (*Prayag Kumari* v. *Siva Prasad*[5]). In Madras, in *Janaki* v. *Dhanu Lall*[6], Collins, C.J., and Parker, J., held that though the executors can establish no right without taking probate, the existence of the will cannot be ignored for all purposes whatsoever and that where a person sued as the heir of her son as on intestacy, to set aside a decree obtained by the defendant on a promissory note executed by the deceased, impleading two other persons as his legal representatives ignoring his mother, it will be open to the defendant to plead the existence of the will, though it had not been probated. No doubt this was not a case of a defendant resisting the title to property claimed by the plaintiff as the heir to a deceased individual, but in substance there was in issue the *locus standi* of the plaintiff which was challenged on the footing of an absence of intestacy. In *Caralapathi Chunna Cunniah* v. *Cota Nammalwariah*[7], Benson, O.C.J. and Sankaran Nair, J., laid down definitely that section 187 (now section 213) will not prevent a defendant from relying upon a will where he was using it as a shield only. *Lakshmanna* v. *Ratnamma*[8] was a case where a contrary view was propounded, *viz.*, that section 187 (now section 213) affects not only the establishment of right by the legatee or one claiming under him but also a defendant who desires to establish such legatee's right as a *jus tertii* for the purposes of his defence. The earlier view was, however, preferred on more or less the same facts in *Shadagopa Naidu* v. *Thirumalaiswami Naidu*[9]. In *Ganta Daniyelu* v. *Gunti Yesu Ratnam*[10], where the plaintiff sued as heir to his wife and the defendant set up a will which was found to be genuine to defeat the plaintiff's claim, Devadoss, J., held that section 187 will not stand in the way of a defendant

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1. (1902) 1 Ch. 218.
2. (1902) 2 Ch. 605.
3. (1927) 53 M.L.J. 709 : I.L.R. 50 Mad. 927 (F.B.).
4. (1915) 20 C.W.N. 122.
5. (1925) 42 C.L.J. 407.
6. (1891) I.L.R. 14 Mad. 454.
7. (1910) I.L.R. 33 Mad. 91.
8. (1914) 25 M.L.J. 556 : I.L.R. 38 Mad. 474.
9. (1915) 30 I.C. 272.
10. (1925) 87 I.C. 354.

putting forward the existence of the will which is itself an answer to the plaintiff's claim, though it was unprobated. The decision in *Parthasarathy Aiyar* v. *Subbaraya Gramany*[1], contains observations seemingly inconsistent. After stating that under section 187 a person who in Court has to prove title and has to deduce that title from a will, whether that person is plaintiff or defendant, cannot do so without producing probate, the Court went on to observe : "This would not prevent a defendant resisting a claim by an heir at law by producing and proving a will of which probate has not been granted." With reference to this observation Coutts Trotter, C.J., remarked in the Order of Reference to the Full Bench in *Ganshamdoss* v. *Gulab Bi Bai*[2] : "I confess myself unable to ascertain what exactly was laid down in *Parthasarathy Aiyar* v. *Subbaraya Gramany*[1]. The case for allowing an unprobated will to be used to defeat the claim of a plaintiff suing as heir is stated perhaps more fully than elsewhere in *Ganshamdoss* v. *Saraswati Bai*[3], by Kumaraswami Sastri, J., who observed : "There is no authority which says that where a plaintiff comes to Court claiming as on intestate succession, his claim can only be displaced by one who has obtained probate of the will. Where it is shown, that the person did not die intestate but left a will, the plaintiff who claims adversely to the will is out of Court irrespective of any proof of claim or title by the defendant. In cases where the plaintiff necessarily fails merely on the ground that there is a will left by a person and that by reason of the will his claim to succeed to the estate of the deceased on the ground of intestacy under the ordinary law is not sustainable, there is nothing to prevent the defendant from pleading and proving the existence of the will. It is unnecessary in such cases for the defendant to prove any independent title of his own. Just as he could plead *jus tertii* he could also plead facts, that would bar the plaintiff's title." These sentiments do not run counter to section 213 and seem to be in consonance with the definition of intestacy in section 30. Nevertheless in *Ganshamdoss* v. *Gulab Bi Bai*[2], a contrary view was upheld and it was laid down that a defendant seeking to defeat a plaintiff's claim as heir should not merely prove that there is a will in existence but also that some one other than the plaintiff has title under the will and hence cannot use the unprobated will as a defence. In Calcutta, also judicial opinion has not been uniform. While in *Basanta Kumar Chuckerbutty* v. *Gopal Chunder Das*[4], the learned Judges held that unless probate or letters of administration are taken, a will cannot prove that anybody named therein has title to the estate of the testator, a view which has been followed in *Ranjit Kumar* v. *Subodh Chandra*[5] and in the case under review, in *Sarala Sundari Debi* v. *Hazari Dasi Debi*[6], it has been stated that in an application for the appointment of a guardian of a minor the petitioner's claim under the ordinary law can be defeated by showing the existence of a will indicating that someone else has been appointed guardian thereunder though the will was unprobated and likewise in *Prayag Kumari* v. *Siva Prasad*[7], N. R. Chatterjee and Panton, JJ., have expressed the view generally that section 187 (now section 213) will not debar the use of a will in evidence for a purpose other than the establishment of a right as executor or legatee. Opinion in Bombay is against allowing an unprobated will to be used for defeating the claim of an heir. In *Haji Mahomed Mitha* v. *Musaji Esaji*[8], Farran, J., has stated on p. 669 : "Suppose he (the heir of Nanabhoy Trikamdas) were to sue the person in possession to redeem the property from the mortgagee of the 7th April, 1890, the defendant in such a suit would have no defence as against the heir unless he could prove that he had acquired the equity of redemption. This however he could not do unless he proved that Virjbhukandas as Nanabhoy's executor had conveyed the equity of redemption to his predecessor-in-title. For this purpose by section 187 of the Succession Act, X of 1865, probate would be necessary." It is true that the same view has commended itself to the Full Bench in Madras in *Ganshamdoss's case* and to the Calcutta High Court in the instant decision. It is, however, submitted that it has not made

1. (1923) 45 M.L.J. 175.
2. (1927) 53 M.L.J. 709 : I.L.R. 50 Mad. 927 (F.B.).
3. A.I.R. 1925 Mad. 861.
4. (1914) 18 C.W.N. 1136.
5. A.I.R. 1937 Cal. 252.
6. (1915) I.L.R. 42 Cal. 953.
7. (1925) 42 C.L.J. 407.
8. (1891) I.L.R. 15 Bom. 657.

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sufficient allowance for the language of section 213 or to the definition of intestacy found in section 30. A fuller examination of the question, if it happens, is therefore bound to be welcome.

HEM CHANDRA BANERJI *v.* ABDUR RAHMAN, I.L.R. (1942) 2 CAL. 75 (F.B.).

This is a decision of a Full Bench of five judges and concerns the construction to be placed on section 147 (2) of the Criminal Procedure Code, whether it will enable a Magistrate to pass an order in the nature of a mandatory injunction directing the removal of an existing obstruction. Section 147 is intended to prevent disputes between parties likely to cause a breach of the peace concerning the use of any land or water. This is the principle underlying the section. Prior to its amendment in 1923, a Magistrate may under section 147, if it appears to him that a right of user set up exists, " make an order permitting such thing to be done or directing that such thing shall not be done." It had been held in a series of cases that those words would cover an order " to remove an existing obstruction *Pasupati Nath Bose* v. *Nando Lal Bose*[1], *Lalit Chandra Neogi* v. *Tarini Prasad Gupta*[2], *Ambica Prosad Singh* v. *Gursahay Singh*[3], *Karupanna* v. *Kandaswami*[4], *Sudalaimuthu* v. *Enam*[5]. The amendment of 1923 introduced sub-section 2 and enacted that " if it appears to such Magistrate that such right exists, he may make an order prohibiting any interference with the exercise of such right. While one set of decisions hold that notwithstanding the change in the phraseology of the section made by the amendment of 1923, it will still be competent to a Magistrate to pass an order in the nature of a mandatory injunction, a different opinion is to be found in certain other decisions. It is clear that while the order under the old section was directed to the person alleging that he was entitled to the right, the order under the amended section is addressed to the person who is interfering with the right, who can be prohibited from so interfering. " Prohibit " means " forbid, prevent or interdict." It connotes inaction or abstention by the person forbidden. " Removal " on the other hand connotes action, a duty to do something. Para 2 of section 133 (1) refers to "removal" whereas all that section 147 contemplates is a " prohibition.". As it stands, a mandatory injunction can issue under the former section whereas only a prohibitory injunction can issue under the latter provision. Further an order under section 133 is not subject to the decision of a Civil Court; but an order under section 147 (2) is subject to such decision. The difference in the language used in the respective sections seems too significant to be ignored. Also if a structure can be removed under section 147 (2) then on a contrary decision by the Civil Court the successful party can recover no damages for the loss of the structure inasmuch as that had been done by the order of the Civil Court and the loss cannot be attributed to the wrongful act of the adversary. Again a power to direct a person "to abstain from an act" cannot *prima facie* empower a Magistrate to make a positive order requiring a person to do a particular thing, *Emperor* v. *B. N. Sasmal*[6]. It is true that the amendment to section 147 in 1923 has not been accompanied by any corresponding amendment in Form No. XXIV in schedule V, which sets out the form of " the Magistrate's order prohibiting the doing of anything on land or water." It is equally true that para 2 of the Form is drawn up not in a manner appropriate to a prohibition from interference by a person claiming exclusive enjoyment with the user set up by the adverse party but as an order directing the former not to take or retain possession of the land concerned to the exclusion of the enjoyment of the right of user alleged. This no doubt lends colour to the contention that a prohibitory order may be an order not to retain possession to the exclusion of the right of user claimed and thus could indirectly contemplate the removal of the obstructions already put up by the

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1. (1900) 5 C.W.N. 67.
2. (1901) 5 C.W.N. 335.
3. (1912) I.L.R. 39 Cal. 569.
4. (1914) 26 M.L.J. 233.
5. (1915) 16 Cr.L.J. 767.
6. (1930) I.L.R. 58 Cal. 1037.

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person restrained to preclude such user. It is also to be noted that prior to 1923, strictly speaking the order should have been one directed to the person claiming the user and not to the person claiming exclusive possession. It is thus clear that it will not be safe to found any argument on the form in which the Magistrate's order to be drawn up under section 147 is prescribed in Form XXIV of Schedule V. It may, however, be taken that the words of section 147 (2) are not intended to be construed too literally. As pointed out by C. C. Ghose, A.C.J., and Mallik, J., in *Khajer Naskar* v. *Tabrej Ali Naskar*[1]: "Each case must depend upon its own facts and it is impossible to lay down a hard and fast rule that in every case the final order of the Magistrate should be exactly in the same words as are used in the section," and to direct the removal of an obstruction may be the same thing as is indicated by section 147 (2). The learned Judges added that the contrary contention may furnish ground for a dialectical argument but that there was no substance nor any sense in that. Again, where it is clear that a prohibitory order can be effectively worked out only by restraining the person from preventing the second party from doing a certain thing, the order cannot be open to the objection of being mandatory in form. Thus in *Ram Dhan Puri* v. *Barhamdeo*[2], where a right to the water coming through a pyne was found to exist and it appeared indispensable to the exercise of that right that a cutting in the bank should be closed, it was considered to be merely ancillary to the declaration of the right to water, and that a prohibition from interference addressed to the second party can contain a restraint on such party from preventing the first party from closing the cutting in the bank. For these reasons, it may not be proper to read section 147 (2) categorically as permitting an order in the nature of a mandatory injunction, as was done in *Venkanna* v. *Venkata Surya Niladri Rao*[3], *Badri Das Agarwala* v. *Sohan Lal Oswal*[4], etc., or as not giving the Magistrate under any circumstances any power of directing the parties to do a positive act as held in *Hari Mati Dasi* v. *Hari Dasi Dasi*[5], *Tarani Mohan De Sarkar* v. *Dwarka Nath Banikya Poddar*[6], *Haradhone* v. *Brojendranath*[7] and in the decision under notice.

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MATI LAL NAG *v.* CORPORATION OF CALCUTTA, I.L.R. (1942) 2 Cal. 105.

While it is generally true that a word derives its colour from the context, the use of one word rather than another connotative of more or less the same meaning may have a significance of its own. The words "permit," "allow" and "suffer" are ordinarily treated as convertible. Still as distinguished from the last two of them the word "permit" is more positive denoting a decided assent. It carries with it the idea of affirmative action. Thus mere knowledge in a person of something that might be done by another will not *per se* import a permission on his part to the act being done by the other. A person cannot be deemed to permit an act where he has no power to prevent it, *Hobson v. Middleton*[8]. In *Nandalal Ray* v. *Corporation of Calcutta*[9], in holding that in the absence of evidence of permission given, a landlord will not be liable for the acts of his tenant in using the demised land for keeping horses for sale, *etc.* without license under section 386 of the Calcutta Municipal Act, Cuming, J., remarked that a person cannot be said to have permitted a thing to be done which it is not in his power to prevent. In the absence therefore of any indication to the contrary either in a covenant or the statute under which the question arises, the test laid down by Cuming, J., seems to be a proper one. In the case under notice where the question was whether the owner of certain premises who let the same to a tenant who carried on a business of which a license under section 386 of the Calcutta Municipal Act had been refused, could be convicted under section 488 in the absence of evidence to show that he intended that the letting should be used for the purpose of carrying on the business without a license, if a license was necessary and could not be obtained, a negative answer was given on

1. A.I.R. 1933 Cal. 752.
2. A.I.R. 1929 Pat. 351.
3. (1930) 50 M.L.J. 430.
4. I.L.R. (1940) 1 Cal. 468.
5. (1925) 30 C.W.N. 238.
6. (1933) 38 C.W.N. 476.
7. (1937) 41 C.W.N. 900.
8. (1827) 6 B & C. 295 : 108 E.R. 461.
9. (1930) I.L.R. 58 Cal. 204.

the ground that where there is no power in a person to control or interdict an act there is no question of permission by him. These decisions are thus clear that the word "permission" should be construed strictly and literally and not in a loose sense.

RAJSHAHI BANKING AND TRADING CORPORATION, LTD. *v.* SURENDRA NATH MITRA, I.L.R. (1942) 2 Cal. 108.

In this case it was held by a Bench that a person executing a writ of attachment issued by a Subordinate Judge is "subordinate" to the latter within the meaning of section 195 (1) (*a*) of the Code of Criminal Procedure, although that Judge did not have control of the nazarat. The learned Judges argued that the peon should be deemed to be "subordinate" to the Subordinate Judge while he was carrying out that Judge's order, that it was the duty of that Judge to protect the peon when he was obstructed and that failure to do so may render the administration of justice a farce. A different view as to the meaning of the term "subordinate" has been taken in Patna and in Madras, in decisions by single Judges. Thus in *Thakur Prasad* v. *Emperor*[1], a naib nazir on deputation by the nazir to execute a decree in pursuance of the order of a Subordinate Judge was obstructed. The nazarat according to the then rules of the High Court was in charge of the District Judge. In holding that a complaint by the Subordinate Judge was incompetent, Macpherson, J., remarked: "It is clear that the complaint referred to in section 195 (1) (*a*) could have been lodged by the naib nazir or by the nazir to whom he is subordinate or by the District Judge to whom all the nazarat staff is subordinate and probably also by the Munsiff who under the orders of the District Judge is in charge of the nazarat department . . . . The naib nazir was indeed not subordinate to the Subordinate Judge administratively as he is to the nazir, the Munsiff in charge of the nazarat and the District Judge. Can he be said to be subordinate to the tribunal which issues an order of attachment which he is executing, so far as the particular case is concerned? On the whole, I am of opinion that the answer is in the negative." Practically the same line of reasoning has been adopted in *Chinna Rangiah, In re*[2]. In this case where an amin executing a decree of a Munsiff's Court was obstructed and the question arose whether it will be competent for the Munsiff to prefer a complaint, Horwill, J., observed: "In a general way amins are of course subordinate to District Munsiffs; but in this particular case the nazarat at Bezwada was under the charge and direction of the nazir subject to the supervision and control of the Subordinate Judge. When the District Munsiff wishes a process to be executed he sends it to the nazarat for necessary action; but neither the nazir nor the process staff are under the supervision and control of the District Munsiff. The amin was not therefore the subordinate of the District Munsiff." While clauses (*b*) and (*c*) of section 195 (1) deal with prosecution for offences alleged to have been committed in or in relation to any proceeding in any Court, clause (*a*) refers to prosecution for contempt of lawful authority of public servants in respect of acts outside the Court. The word "subordinate" in the former clauses can have reference only to subordinacy through appeal or revision to a higher forum and control thereby, whereas the same term in clause (*a*) seems to contemplate subordination through administrative control. In that view therefore the construction of section 195 (1) (*a*) adopted by the High Courts in Patna and Madras seems to be more in consonance with the language of the section than that adopted in the case under notice.

JANAKI *v.* KANARU AMBALAVASI, (1942) 1 M.L.J. 603.

One of the points decided in this case is that where property is sold free from encumbrances and the vendor who had undertaken to discharge immediately an encumbrance on the property failed to do so, it will be competent to the vendee to

1. A.I.R. 1936 Pat. 74.
2. (1942) 2 M.L.J. 615.

retain out of the purchase money a sufficient amount for discharging the encumbrance, and that the vendor's undertaking cannot be regarded as a contract to the contrary excluding the applicability of section 55 (5) (*b*) of the Transfer of Property Act. That section enacts that where a property is sold free of encumbrances the buyer may retain out of the purchase-money, the amount of any encumbrances on the property existing at the date of the sale and shall pay the amount so kept back to the persons entitled thereto. It follows from this that where property is sold free from encumbrances and yet there are encumbrances outstanding on the property, the buyer may keep back sufficient out of the sale price to pay off the encumbrances though he has not been directed to pay the same by the contract of sale, *Mt. Naima Khatun* v. *Basant Singh*[1]. The principle is that in such cases the vendor becomes liable for the moneys paid by the purchaser to discharge the encumbrances on the property which the vendor had failed to discharge, *Nathu Khan* v. *Thakur Burtonath Singh*[2], and hence it is that the vendee can set off the amounts so paid against a proportionate part of the sale price, *Munir-un-nissa* v. *Akbar Khan*[3]. Section 55 (1) (*g*) expressly states that in the absence of a contract to the contrary it is the vendors who must discharge the encumbrances; and if the vendor undertakes in the sale-deed to discharge the encumbrances the specific contract is only a contract which is in accordance with the general law as to the rights of a buyer and seller enunciated in section 55 and can in no sense be characterised as a contract to the contrary shutting out section 55 (1) (*b*) operating in favour of the buyer. This conclusion derives support from the ruling in *Abdul Wahid Khan* v. *Sher Muhammad Khan*[4], where it was held that in a suit by a vendor to enforce his lien founded upon a breach of a condition in the sale-deed by the vendee regarding the purchase-money it would be competent to the vendee to plead as a defence to the action the breach of yet another condition in the contract of sale by the vendor.

KULKARNI *v.* GANPAT HIRAJI TELI, I.L.R. (1942) Bom. 287.

One of the points decided in this case concerned the interpretation of the second clause in section 60 (1) (*h*) of the Civil Procedure Code. That clause exempts from attachment "the wages of labourers and domestic servants whether payable in money or in kind; and salary to the extent of the first hundred rupees and one half of the remainder of such salary." The question was whether the latter limb is but a proviso to the former portion, whether the word 'salary' means salary of labourers and domestic servants in the context. Simple though it may seem, there is a conflict of judicial opinion on the matter. Section 60 is a long and complicated section and any interpretation of clause (*h*) founded on the language of that clause alone may not be warranted. The wording of the clause is inartistic and there is a separate clause—clause (*l*) —specifically providing for a certain measure of exemption from attachment of the salary of a public officer or of any servant of a railway company or of a local authority. This clause suggests at any rate that the term 'salary' in clause (*h*) is that of other officers and servants, *i.e.*, of those in private employment. To read it, however, as referring to the wages of labourers and domestic servants would lay it open to criticism. Under such interpretation the second part of the clause will become the controlling part and the first part otiose. It is well established that where analogous words are used each may be presumed to be susceptible of a separate and distinct meaning, for the legislature is not supposed to use words without a meaning.[5] That apart, it may not be proper to equate the words "wages" and "salary." The term 'salary' is defined to mean a recompense or consideration generally periodically made to a person for his service in another person's business; also wages, etc.[6] But generally the word 'salary' is used for payment of services of a higher class, and 'wages' is confined to the earnings of

1. A.I.R. 1934 All. 406, 420 (F.B.).
2. (1922) 42 M.L.J. 444 (P.C.).
3. (1908) I.L.R. 30 All. 172, 175 (F.B.).
4. A.I.R. 1935 All. 463.
5. Maxwell, Principles of Interpretation, 8th Ed., p. 276.
6. Wharton, Law Lexicon, 14th Ed., p. 896.

labourers and artisans," *Gordon* v. *Jennings*[1], *Riley* v. *Warden*[2], *Sleeman* v. *Barrel*[3], *Ingram* v. *Barnes*[4]. Thus salary seems to denote a higher degree of employment and is suggestive of a larger compensation for more important services than wages. Another distinction has also been suggested in some cases, namely, that salary is a per month or per annum compensation whereas wages would be compensation paid or to be paid by the day or the week, In re *Rogers : Ex parte Collins*[5]. In *Jnanendra Kumar* v. *Akash Chandra*[6], adverting to these words in section 60 (1) (*h*) of the Civil Procedure Code, Biswas, J., remarked : "I do not .... desire to express any final opinion on the point. All that I need say is that from the collocation of the words used in the clause, it is fairly arguable that the word 'salary' is intended to mean salary of labourers and domestic servants only seeing that the clause appears to be enacted for the benefit of this particular class of persons." It is to be noted that the learned Judge has expressed no *final* opinion. His observations, if correct, would attribute a redundancy to the legislature in enacting the two limbs of the clause. The opinion treats as synonymous the terms 'salary' and 'wages,' which according to the authorities will not be sound. Judicial opinion elsewhere has inclined to a different view, see In re *Hormusji Jamshedji*[7]. In so far therefore as the instant decision holds that the second clause of section 60 (1) (*h*) is intended to protect to a limited extent the salaries of persons in private employment, who however are outside the category of labourers or domestic servants, while the wages of the latter class remain wholly protected by the earlier part of the clause, there is much to be said in favour of that view.

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1. (1882) 51 L.J.Q.B. 417.
2. (1848) 18 L.J.Ex. 120.
3. (1863) 33 L.J.Ex. 153.
4. (1857) 7 E. & B. 132 : 119 E.R. 1197.
5. (1894) 1 Q.B.D. 425.
6. A.I.R. 1938 Cal. 325.
7. A.I.R. 1939 Sind 135.

EMPEROR *v.* MOHAMMAD SHAIKH, I.L.R. (1942) 2 Cal. 144.

Whether a first information report can ever be regarded as substantive evidence, and, if so, when, form the subject of consideration in the above case. In *Asfar Sheikh* v. *King-Emperor*[1], it was stated, perhaps a trifle broadly, that the first information report is not evidence in the case and is tendered by the Crown only for such use as the defence may be able to make of it and to test the consistency of the prosecution case. It is true that however important first informations may be, they do not prove themselves and have to be tendered under one or other of the provisions of the Evidence Act. As explained by Sulaiman, J., in *Emperor* v. *Chittar Singh*[2], the first information report by itself is "no evidence of the existence of the facts which it mentions. Technically a first information report taken down by a police officer amounts to an entry in an official record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty and in the performance of a duty especially enjoined by law under which such record is kept and therefore falls within the scope of section 35, Evidence Act. But that would simply make it a relevant fact" and not impart to it any higher value. In a general way a number of cases have stated that though the first information report is a document of great importance and is in practice always and very rightly produced and proved in a criminal trial, it is not a piece of substantive evidence and it can be used only as a previous statement admissible to corroborate or contradict the author of it and not any further, *Autor Singh* v. *King-Emperor*[3], *Mohan Singh* v. *King-Emperor*[4], *Emperor* v. *Chittar Singh*[2], In re *Sankaralinga Thevan*[5]. This statement does not however constitute a complete picture. That the first information report may in certain circumstances become substantive evidence is clearly brought out by Rankin and Duval, JJ., in *Azimuddy* v. *Emperor*[6], where they observed that though the usual course is for the prosecution to call for the informant and for the first information report to be tendered as corroboration under section 157, Evidence Act, yet it could also be tendered in a proper case under section 32 (1) as a declaration as to the cause of the informant's death, or as part of the informant's conduct under section 8 and the defence could also prove the information to impeach the informant's credit under section 155 or to contradict him under section 145; see also *Kapur Singh* v. *Emperor*[7], *Mahla Singh* v. *Emperor*[8]. Thus a first information report lodged by a person who died subsequently, relating to the cause of his death is admissible as substantive evidence. Only in such cases, as the decision under notice points out, the jury should be cautioned that the statement had not been made on oath nor tested by cross-examination. To lay down *simpliciter* in such a case that the first information report is not a substantive piece of evidence but the fabric on which the prosecution depends will not be correct.

JOHUR MULL JUGAL KISHORE *v.* KASI PRASAD JHAJHARIA, I.L.R. (1942) 2 Cal. 160.

This case deals with, in the words of Panckridge, J., "an interesting and a not unimportant point of limitation," namely, whether the words "after the time for making an application to set aside the award has expired" in section 17 of the Arbitration Act, 1940, contemplate only the period prescribed by Article 158 of the Limitation Act or whether they allow for the impact of section 4 of the latter Act in any case where the benefit of that section could be had. In the case under notice, the period prescribed by Article 158 for an application to set aside an award duly filed and of which effective notice had been given expired on a Sunday. The next day the respondent moved for a judgment in terms of the award and the present petitioner being absent judgment was accordingly rendered. Later in the day the petitioner applied to set aside the award claiming the benefit of section 4 and as preliminary to that applied for the judgment also being vacated as one passed

1. (1910) 15 C.W.N. 198.
2. (1924) I.L.R. 47 All. 280.
3. (1913) 17 C.W.N. 1213.
4. A.I.R. 1925 All. 413.
5. (1929) 58 M.L.J. 397 : I.L.R. 53 Mad. 590.
6. (1926) I.L.R. 54 Cal. 237.
7. A.I.R. 1930 Lah. 450.
8. A.I.R. 1931 Lah. 38.

without jurisdiction, as according to him it had been passed *before* the expiry of the time for making an application to set aside the award had expired. Section 4 provides that where the period of limitation expires when the Court is closed, the suit, etc., may be instituted on the day the Court re-opens. The language of the section is clear that the period of limitation has in fact expired ; only, the suit, etc., shall nevertheless not be liable to be dismissed on that ground. As stated by Lord Tomlin, in *Maqbul Ahmed* v. *Pratap Narain Singh*[1] : "The language employed in section 4 indicates that it has nothing to do with computing the prescribed period. What the section provides is that where the period expires on a day when the Court is closed, notwithstanding the fact, the application may be made on the day that the Court reopens ; so that there is nothing in the section which alters the length of the prescribed period" ; see also *Beni Prasad Kuari* v. *Dharaka Rai*[2], *Naganna* v. *Krishnamurthy*[3], *Laxman Krishnaji* v. *Yadao Raghoba*[4], *Shivjiram* v. *Gulabchand*[5]. What then is the scope of the benefit accruing under section 4 ? The section in terms permits the filing of a suit, the preferring of an appeal or the making of an application on the reopening day. There is nothing to warrant the doing of any other act. Section 10 (1) of the General Clauses Act may also be looked at in this connection. It lays down that where under any Act or Regulation, an act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open. Here again the language suggests that only the acts specified can be done and no more. As such, under section 4 of the Limitation Act it would follow that apart from the filing of a suit, preferring of an appeal, and making an application, no other act can be said to be contemplated as falling within its purview. In *Fatima Bi* v. *Nagoorkhan*[6], it has been held that where the last day when a debt could have been enforced was a public holiday and on the next reopening day the debtor was adjudicated insolvent, the debt could be proved in the insolvency and it is not necessary for the creditor for the purpose of keeping his debt alive to file a suit on the reopening day after the intervention of the insolvency on that very day with leave of Court. In effect this amounts to a recognition that the right to enforce the debt though barred conferred by section 4 will keep alive the debt on that day for other purposes as well, such as for proof in the insolvency. A step further has been taken in *Thimmanna Bhat* v. *Aithappa Adyanthayya*[7]. In that case the last day for filing a suit on a promissory note was the 8th May, when the Courts were closed. On the reopening day, namely, the 1st June, the payee assigned his rights under the note to the petitioner and on the same day the assignee filed a suit. It was held following the Full Bench ruling in *Fatima Bi's case*[6] that the debt under the note being enforceable under section 4 on the date of the assignment, the debt was alive on that day and there was nothing to prevent the creditor from assigning it to any person. The Full Bench ruling was anterior to the Privy Council decision in *Maqbul Ahmed's case*[1] which has made it definitely clear that section 4 does not in any way extend the period of limitation and that the section proceeds on the footing that limitation has in fact expired. Consistently with that hypothesis it is rather difficult to see how the debt can be regarded as kept alive at all or as kept alive except for the special purpose of filing a suit on the reopening day of the Court. The conclusion arrived in the case under notice that where the period allowed by Article 158 for an application to set aside an award duly filed had expired on a holiday and an application for a judgment in terms had been made on the next day and granted, a petition later in the day to vacate the judgment as one not made on an application made *after* the expiry of the period prescribed for setting aside the award cannot be granted, is in strict accord with the Privy Council ruling, though opposed to the reasoning underlying the Madras decisions.

1. (1930) I.L.R. 57 All. 242.
2. (1901) I.L.R. 23 All. 277.
3. (1932) 61 M.L.J. 675: I.L.R. 55 Mad. 286.
4. A.I.R. 1940 Nag. 401.
5. I.L.R. (1941) Nag. 144.
6. (1932) 62 M.L.J. 256 : I.L.R. 55 Mad. 630 (F.B.).
7. (1940) 2 M.L.J. 251.

PROVINCE OF BENGAL *v.* MUHAMMAD YUSUF, I.L.R. (1942) 2 CAL. 378.

Falsa demonstratio non nocet—mere false description does not vitiate if there be sufficient certainty as to the object. The above case is an instance of the application of the maxim in land acquisition matters. A declaration made under section 6 of the Land Acquisition Act stated that what was proposed to be acquired was "a piece of land *comprising* cadastral plot No. 3127 and measuring more or less ·55 of an acre." In the plan depicting the land to be acquired the whole of the property contemplated by the declaration was not included. The question then arose whether the plan "*restricted*" or "*elucidated*" the text of the declaration. If the latter conclusion was sustained, the maxim set out *supra* would apply; otherwise not. It is indisputable that land not covered by the declaration cannot form the subject of a valid acquisition, *Harish Chunder Neogy* v. *Secretary of State*[1], *Gajendra Sahu* v. *Secretary of State*[2]. The declaration when published in the Official Gazette gives public notice of the intended acquisition and once it has issued all the land included within it is liable to be acquired and must be acquired unless Government withdraws from the acquisition under section 48. Section 6 lays down *inter alia* that where a plan has been made of the land the place where the plan may be inspected should also be specified in the declaration. This provision makes clear that the plan is not an essential preliminary to the acquisition, but only that where one exists it should be notified, presumably to enable persons standing to be affected by the acquisition to understand the subject of the acquisition easily and vividly. This view is reinforced by the fact that while section 4 (2) states that it will be lawful for the land acquisition officer to "set out the boundaries of the land proposed to be taken and to mark the same" section 8 enunciates a duty that the land has to be marked out after the notification of the declaration if it has not already been done under section 4. The preparation of the map may thus precede or succeed the declaration and is by no means an indispensable part of it. In such circumstances can the map control the declaration where they conflict with each other in any particular? In *Roe* v. *Vernon*[3], it was observed by Lord Ellenborough, C.J., that "if there be a description of the property sufficient to render certain what is intended, the addition of a wrong name or of an erroneous statement as to quantity, occupancy or locality or an erroneous enumeration of particulars will have no effect." Where the particular description comes *first* the effect of it is not altered, as pointed out by Littledale, J., in *Doe* v. *Galloway*[4] by words of suggestion or false demonstration following it. In the same case Parke, J., stated: "The rule is clearly settled that when there is a sufficient description set forth of premises by giving the particular name of a close, or otherwise, we may reject a false demonstration; but if the premises be described in general terms and a particular description be added, the latter controls the former." In *Llewellyn* v. *The Earl of Jersey*[5], it was laid down by Parke, B., that "as soon as there is an adequate and sufficient definition with *convenient certainty* of what is intended to pass . . . . any subsequent erroneous addition will not vitiate it; according to the maxim *falsa demonstratio non nocet.*" The case of *Horne* v. *Struben*[6], was one where there was a grant of land with certain specified boundaries "as will further appear by the diagram furnished by the surveyor." In discussing what is the degree of authority of the diagram in relation to the text of the grant in which it was mentioned, Lord Robertson remarked: "Assuming as appears to be the case in regard to the western boundary that the diagram contradicts the unambiguous text of the title, it must give way to the text. The words in the grant which introduce the diagram are, 'as will further appear from the diagram of the surveyor.' Now as a matter of construction, this is merely an appeal to the diagram for further elucidation of the text, and not a subordination of the text to the diagram. If in a matter not requiring elucidation the diagram is repugnant to the text, this merely shows that the diagram is not exact and affords a rough delineation of the farm." The principles emerging from the decisions are: (1) where the title does not require elucidation any diagram contradicting it must give way to it; (2) unambi-

1. (1907) 11 C.W.N 875.
2. (1908) 8 C.L.J 39.
3. (1804) 5 East 51: 102 E.R. 988.
4. (1833) 5 B & Ad. 43: 110 E.R. 708.
5. (1843) 11 M. & W. 183: 152 E.R. 767.
6. (1902) A.C. 454 (P.C.)

guous text for this purpose does not postulate meticulous description but what may be called *convenient certainty*; (3) if the "particular" description occurs first and is adequate, a diagram appealed to later cannot control it, but if contradictory in any respect should be treated as a false demonstration; (4) whether the earlier description is "particular" or "general" and whether it is characterised by adequacy in any case will essentially be a question of fact; (5) if the earlier description is only "general," any diagram appealed to later will control the former. In the case under review it cannot be said that the property proposed to be acquired had not been set out with *convenient certainty* in view of the fact that the cadastral plot number as well as the area of the land proposed to be acquired had been set out in the declaration. The fact that the map indicated only a lesser area or comprised only a portion of what had been stated earlier in the declaration as the subject of the proposed acquisition can only be regarded as a false demonstration. In the language of Lord Robertson, in *Horne's case*, the map should be regarded as but a rough and inexact delineation of the plot to be acquired and not as in any manner subordinating the text of the declaration to it.

NATIONAL IRON AND STEEL CO., LTD. *v.* ELECTRIC INSPECTOR, BENGAL, I.L.R. (1942) 2 Cal. 403.

Section 247 of the Criminal Procedure Code lays down the general principle that a person charged with a summons case offence is entitled in law to an acquittal if the complainant without sufficient cause does not appear on the day appointed for the appearance of the accused or on any day subsequent thereto, to which the hearing may be adjourned, *Venkatrama Aiyar* v. *Sundaram Pillai*[1]. The section gives the Magistrate a discretion, *Shermull* v. *Corporation of Calcutta*[2]. What latitude he will show to the complainant is entirely discretionary and there is nothing illegal if he dismisses the complaint, *Sriramulu* v. *Viraragadu*[3]. The validity of a dismissal occasioned by the default of the complainant in appearing cannot be challenged merely on the ground that the complainant and his witnesses had already been examined, *Mudoosoodhun* v. *Hari Dass*[4], *Ramjiwan Bai* v. *Abilakh Barai*[5]. A Magistrate is entitled to call up a summons case at any time of the day to which it is posted and to dismiss it if the complainant is absent, unless for any particular reason the Court adjourns the case. The contention that it is sufficient if the complainant appears at any time during the day fixed for hearing and that the day means the ordinary working hours of the Court is not sound, for, what section 247 requires is that the complainant should be present when the case is called for hearing. The object of the section is really to prevent the complainant from being dilatory in the prosecution of the case, *Rangaswami* v. *Narasimhalu*[6], *Kuttiyali* v. *Pari Makri*[7], *Tonkya* v. *Jaganna*[8]. Where however the complainant did not appear in Court owing to non-service of notice and ignorance of the postponed date of hearing he cannot be said to be absent within the meaning of the section so as to warrant a dismissal of his complaint, *Nune Panakalu* v. *Subba Rao*[9]. Likewise if the Magistrate under a mistake took up the case on a day for which it was not fixed and dismissed the complaint the order of dismissal will be a nullity, *Achambit Mandal* v. *Mahatab Singh*,[10] *Mahadeo* v. *Emperor*[11]. In the case under notice, the allegation was that when the case was adjourned on 2nd April, 1941 the Magistrate assured the complainant that the case would not be taken up on 25th April, 1941, until 3 P.M.; that in fact by mistake it was taken up at 2 P.M. and dismissed in the absence of the complainant because the complainant was unable to attend before 3 P.M. If the allegation was proved, then under the rulings cited *supra* the order of dismissal may not be sustainable. There was however nothing on the record to show that there was any

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1. (1923) 44 M.L.J. 119.
2. A.I.R. 1923 Cal. 725: *see also* Pirag Lal *v.* Rustam Singh, A.I.R. 1936 All. 658.
3. A.I.R. 1932 Mad. 563.
4. (1874) 22 W.R. 40.
5. (1913) 18 C.W.N. 584.
6. (1884) I.L.R. 7 Mad. 218.
7. (1884) I.L.R. 7 Mad. 356.
8. (1926) 51 M.L.J. 730: I.L.R. 49 Mad. 883.
9. (1928) 57 M.L.J. 331: I.L.R. 52 Mad. 695.
10. (1914) I.L.R. 42 Cal. 365.
11. A.I.R. 1934 All. 1025.

undertaking that the case would not be heard before 3 P.M., and the order merely stated : "Prosecution absent. All accused acquitted under section 247, Criminal Procedure Code." In the circumstances, it is difficult to take exception to the decision by the High Court that "whatever may be said regarding orders passed on dates other than the fixed date the same argument cannot be used in a case where from the records everything was in order and *prima facie* the Magistrate acted with jurisdiction."

BIJAY KUMAR SAHA *v.* RAMA PATI BASU, I.L.R. (1942) 2 Cal. 413.

One of the questions which, untrammelled by authority in that Court, the learned Judges of the Calcutta High Court, considered in the above case was whether on the insolvency of the manager of a Hindu joint family other than the father, his power to sell the property of the family inclusive of the interests of the other coparceners for paying off debts binding on the family would, under the provisions of the Provincial Insolvency Act, vest in the official receiver. It is of interest to note that the conclusion in the negative reached by that Court was about a couple of months later independently arrived at by a Full Bench of the Madras High Court in *Rama Sastrulu* v. *Balakrishna Rao*[1]. It is now settled that in construing the law of insolvency in British India one should confine oneself to the express provisions of the particular statute relating to insolvency and should not be guided by any consideration foreign to such provisions, see *Sat Narain* v. *Behari Lal*[2], *Thimmiah* v. *Official Receiver, Bellary*[3], *Chockalingam Chettiar* v. *Official Assignee*[4]. It has been equally authoritatively suggested that it will not be legitimate to rely on decisions under the earlier enactments relating to insolvency, such as *Fakirchand Motichand* v. *Hurruckchand*[5], *Rangayya Chetti* v. *Thanikachalla Mudali*,[6] etc., as affording true guidance to the meaning of the provisions found in the later Acts, see *Sat Narain* v. *Behari Lal*[2]. Likewise, cases under section 266, Civil Procedure Code, 1882, or under section 60, Civil Procedure Code, 1908, will be of no help as they depended on different considerations and were likely to "mislead the Court" in construing the insolvency statutes, *ibid.* Turning then to the provisions of the Provincial Insolvency Act, section 28 (2) lays down that on the making of an order of adjudication the whole of the property of the insolvent shall vest in the receiver and shall become divisible among the creditors. Sub-sections 3, 4 and 5 particularise certain categories which are or are not to be deemed the property of the insolvent for purposes of vesting. Section 2 (1) whose purpose, according to the marginal note thereto, is to provide the definitions lays down : "In this Act unless there is anything repugnant in the subject or context, ... (*d*) 'property' *includes* any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit." In fact, however, far from providing a definition the clause only states that 'property' *includes* certain things thereby suggesting that the term has a much wider import. And in general jurisprudence 'property' comprises "all valuable right or rights which may be turned into money or whose worth can be assessed in money."[7] The general sense however seems to be impermissible in the context. By specific mention of a particular type of disposing power over any property as itself to be regarded as 'property' under the Act, *prima facie* property over which such disposing power does not exist is to be excluded from the purview of that term. The expression 'own benefit' means sole benefit, In the goods of *Jane Turner*[8], In re *Salt*[9], In re *S.S.B.*[10] A power that can only be exercised for the joint benefit of the bankrupt and another cannot be said to be a power exercised for one's own benefit, In re *Mathieson*[11], In re *Taylor's Settlement Trusts*[12]. The question then will be whether though not included under section 2 (1) (*d*), the manager's power of disposal over family property to discharge

1. (1942) 2 M.L.J. 457 (F.B.).
2. (1924) 47 M.L.J. 857, 863, 871 : L.R. 52 I.A. 22 : I.L.R. 6 Lah. 1 (P.C.).
3. (1939) 1 M.L.J. 158, 161.
4. (1943) 1 M.L.J. 239 (P.C.).
5. (1883) I.L.R. 7 Bom. 438.
6. (1895) I.L.R. 19 Mad. 74.
7. Williams, Real Property, 24th edition, p. 4.
8. (1886) 12 P.D. 18.
9. (1896) 1 Ch. 117.
10. (1906) 1 Ch. 712.
11. (1927) 1 Ch. 283.
12. (1927) 1 Ch. 435.

debts incurred for family purposes would not vest in the receiver under section 28 (2). The provisions of the Act naturally must be read together and unless section 28 shuts out section 2 (1) (*d*) the two provisions should be considered as a whole. Section 2 (1) (*d*) being the definition clause constitutes the key to the understanding of the term 'property' wherever it occurs in the Act, unless expressly excluded. So property, the power of disposal over which is neither absolute nor unconditional nor exclusively for one's benefit, such as joint family property cannot come within the scope of 'property' which would vest in the receiver. Nor is there any other provision in the Act by which a 'power of disposal' not amounting to 'property' could become vested as such in the receiver. The repugnancy in treating the qualified power of disposal which the manager of a Hindu joint family has as property vesting in the receiver on insolvency arises from the subject itself and in that view to distinguish the ruling of the Privy Council in *Sat Narain* v. *Behari Lal*[1], as one turning on the provisions of the Presidency Towns Insolvency Act, a different statute, cannot carry conviction. The decisions suggesting the view that on the insolvency of a manager even if he is not the father, his power to dispose of joint family property would vest in the receiver may be said to proceed on one or other of the following grounds : (1) section 2 (1) (*d*) is not exhaustive and cannot be permitted to control section 28, *Biswanath Sao* v. *Official Receiver*[2]; (2) it is needless to call in aid section 2 (1) (*d*) inasmuch as section 28 by itself is sufficient to vest the power in the receiver, see per Krishnan, J., in *Balavenkataseetharama Chettiar* v. *Official Receiver*[3]; (3) section 2 (*e*) of the Presidency Towns Insolvency Act though identical in wording as section 2 (1) (*d*) of the Provincial Insolvency Act had yet to be construed narrowly to avoid repugnancy to other provisions of that Act; whereas there being no provision relating to ' power ' as distinct from ' property ' in the Provincial Insolvency Act, the latter term should be understood in its general sense only, see per Venkatasubba Rao, J., in *Balavenkataseetharama Chettiar* v. *Official Receiver*[3], *Haridas Himatlal* v. *Lallubhai Mulchand*[4] ; (4) having regard to the undoubted liability of the joint family property for the debts binding on the family, property should be taken as including a power to sell, see per Sen, J., in *Anand Prakash* v. *Narain Das Dori Lal*[5] ; (5) it will be anomalous if the manager's undivided share vests in the receiver but not his power to dispose of joint family property inasmuch as even in regard to his undivided share the manager owns it in a limited sense only ; (6) the legislature could never have intended that a power should vest under the Presidency Towns Insolvency Act in the Official Assignee in the case of a father, but not under the Provincial Insolvency Act ; (7) the principle of *stare decisis* should govern. The first of the reasons, even if acceptable, cannot carry the matter far. It overlooks the fact that as the definition section, section 2 (1) (*d*) cannot be divorced from the other sections but will have to be applied in the understanding of them unless there is anything in the context to exclude such application. The second ground that section 28 is sufficient by itself to vest the power of the manager to dispose of joint family property in the receiver if the term ' property ' is understood comprehensively, will be valid but for the fact that the Act having distinguished between ' property ' and ' power ' at one place by providing for a particular class of power being regarded as ' property ' could not have intended to attribute to ' property ' a larger sense in another portion of the Act by mere implication. The argument that the construction placed by the Privy Council on section 2 (*e*) of the Presidency Towns Insolvency Act should be ignored as one under a different statute does scant justice to the absolute and entire identity between the wording of that provision and that in section 2 (1) (*d*) of the Provincial Insolvency Act. As for the fourth reason, however plausible it may be, there is no warrant for the assumption underlying it that the receiver appointed on adjudication should stand in the same jural position as the manager. The powers of the receiver flow from the statute and must be sought under it ;

1. (1924) 47 M.L.J. 857 : L.R. 52 I.A. 22 : I.L.R. 6 Lah. 1 (P.C.).
2. (1936) I.L.R. 16 Pat. 60 (F.B.).
3. (1926) 51 M.L.J. 269 : I.L.R. 49 Mad. 849 (F.B.).
4. (1930) I.L.R. 50 Bom. 110.
5. (1930) I.L.R. 53 All. 239.

whereas the powers of the manager depend upon considerations peculiar to the personal law of the parties, see *Nilakantha Narayan Tewari* v. *Debendra Nath Ray*[1]. The next ground also is not unchallengeable. The existence of one anomaly, namely, the vesting of the undivided share of the insolvent is no reason why further anomalies should be countenanced. The sixth reason that the legislature could not have intended to make any distinction between the Presidency Towns and the mofussil in regard to the law applicable to vesting savours of an assumption for which there is no actual basis. And having regard to the fact that section 28 (5) of the Provincial Insolvency Act corresponds to section 52 (1) of the Presidency Towns Insolvency Act, section 28 (4) to section 52 (2) (*a*) and section 28 (3) to section 52 (2) (*c*), the absence in the Provincial Insolvency Act of a provision corresponding to section 52 (2) (*b*), particularly when the Provincial Act is a later Act, may with reason be contended to be deliberate and not accidental, *see* per Devadoss, J., in *Official Receiver* v. *Ramachandrappa*[2]. Further there is also the suggestion in *Rama Sastrulu* v. *Balakrishna Rao*[3] that under the Provincial Insolvency Act even where the manager is the father there will be no vesting in the receiver of his power to sell joint family property for satisfying his debts properly incurred. Nor is the last of the reasons, *stare decisis*, permissible. There is in fact no consistent course of decisions even in the same High Court, much less in the different High Courts, (see *Murugappa Mudali* v. *Official Receiver*[4], per Curgenven, J., in *Official Receiver, Anantapur* v. *Ramachandrappa*[2], per Bhashyam Ayyangar, J., in *Nunna Setti* v. *Chidaraboyina*[5], *Nilakantha Narayan Tewari* v. *Debendra Nath Ray*[1], per Macleod, C.J., in *Shripad Gopalkrishna* v. *Basappa Rudrappa*[6]) on the construction of sections 28 and 2 (1) (*d*) regarding which above all things it is desirable that there should be uniformity of understanding. The case under notice is no doubt one where the parties were governed by the Dayabhaga law but as the learned Judges point out this hardly affects the present question, for under that law the special position of the father does not come into the picture at all inasmuch as there can be no joint family consisting of a father and his sons in that school and the powers of an ordinary manager are about the same by whichever school of law the parties are governed. The decision is however of great interest inasmuch as apart from Patna and Madras, the only other High Court to consider the question in the light of the judgment of the Privy Council in *Sat Narain* v. *Kishen Das*[7], is the Calcutta High Court and also because the view taken therein is to the same effect as the pronouncement of the Full Bench in Madras in *Rama Sastrulu* v. *Balakrishna Rao*[3].

ANNADA CHARAN CHAKRABARTI *v.* EMPEROR, I.L.R. (1942) 2 Cal. 475.

This decision propounds a rule of practice which it will be salutary to remember before security bonds are held to be forfeited under section 514, Criminal Procedure Code. According to sub-section (1) when a bond is proved to have been forfeited the Court has to record the grounds of such proof and thereafter call upon the person bound by such bond to pay the penalty thereof or to show cause why it should not be paid. It is clear that proof of forfeiture must concern and be addressed in respect of each individual bond and that evidence of a general kind embracing all the bonds will not suffice. In other words the evidence must establish a case for forfeiture separately for each bond. In the case in question proceedings under section 107 had been drawn up against six persons who were later on bound over. Subsequently on a report of their having acted in violation of the terms of the bond all of them were by an omnibus order held to be forfeited. In the circumstances the ruling of the Calcutta High Court that where there are several bonds alleged to have been forfeited it has to be established separately that each particular bond has been forfeited and evidence with regard to one bond cannot be used with regard to another is one which carries out the spirit of the section, which if not observed will cause considerable harm in practice.

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1. (1935) I.L.R. 15 Pat. 363.
2. (1928) 55 M.L.J. 721 : I.L.R. 52 Mad. 246.
3. (1942) 2 M.L.J. 457 (F.B.).
4. (1943) 1 M.L.J. 24.
5. (1902) I.L.R. 26 Mad. 214.
6. (1925) I.L.R. 49 Bom. 785.
7. (1936) 71 M.L.J. 812 : L.R. 63 I.A. 384 : I.L.R. 17 Lah. 644 (P.C.).

MANINDRA KUMAR MAJUMDAR *v.* EMPEROR, I.L.R. (1942) 2 Cal. 482.

This case also concerns the application of section 514, Criminal Procedure Code. It decides that where the bond executed by a surety gave an undertaking to produce an accused in a certain Court "on being called upon to do so," in the absence of any formal notice calling upon the surety to produce the accused, it cannot be said that the surety has failed to perform the conditions of the bond or that the bond has been forfeited. It was in evidence that no order of any kind was actually communicated to the surety to produce the accused on any particular day. It has always been held that a bond imposing a penalty must be construed strictly and the party alleging that the condition has been broken must prove the breach and a breach cannot be assumed, see *Vithaldas Moolji* v. *Emperor*[1]. Thus where there was no intention not to appear and the Court had not ordered the party to appear on the particular day, it was held that the bond could not be forfeited, *Empress* v. *Asanulla Khan*[2]. The decision in *Behari Lal Chatterjee* v. *Emperor*, *Rash Behari Sen* v. *Emperor*[3] also points to the same conclusion. In that case the undertaking was to produce the accused "whenever required", and it was held that the latter expression implied that a requisition might be made for the production of the accused. The conclusion reached in the instant decision that the forfeiture of the bond in that case was illegal is thus in strict conformity with precedents.

ORENDRA CHANDRA SINGH *v.* BULAQI RAM, I.L.R. (1942) All. 1.

This case deals incidentally with the interesting question, how far possession of a part could be treated in law as possession of the entirety of a piece of land for purposes of adverse possession. Acts of possession over a part of any immovable property may in many cases be evidence of *de facto* possession of the whole. As observed by Lord Blackburn, in *Lord Advocate* v. *Lord Blantyre*[4], "all that tends to prove possession as owners of parts of the tract, tends to prove ownership of the whole tract; provided there is such a common character of locality as would raise a reasonable inference that if the claimants possessed one part as owners they possessed the whole." To a like effect is the view of Baron Parke in *Jones* v. *Williams*[5]. The rule however operates with full force only in favour of a rightful owner and has to be applied with caution and reservation in the case of a wrongdoer, as it is not the policy of the law to assist him. Thus it has been held that in regard to a title founded on adverse possession, it will be strictly limited to that area only of which the claimant has been in actual possession. *Tantum prescriptum quantum possessum.* Possession by a wrongdoer over a part, except where there is a close connection and inter-dependence between the part actually possessed and the whole of which it is claimed to be a part, must be confined to the part of which he is actually in possession, see *Mohini Mohun* v. *Kumar Promoda*[6], *Wali Ahmed Chowdhury* v. *Tota Meah Chowdhury*[7]. The same principle is laid down in *Neill* v. *Duke of Devonshire*[8], where it was stated that if a tract of land or water can be described a *unum quid* (a connected and unbroken entirety) exercise of dominion over certain parts in accordance with a claim of title to the whole may be evidence of possession of the whole. All questions as to the amount of use and enjoyment of the tract by the claimant and as to the sufficiency of such use and enjoyment to constitute possession of the whole extent claimed will however be pure questions of fact, *Secretary of State for India in Council* v. *Neelakutti Sivasubramania Thevar*[9]. It would, for instance, be the proper conclusion to reach, namely, that possession of part can be regarded as possession of the whole for purposes of adverse possession, where the land had no defined boundaries and was waste and the acts of enjoyment though confined to certain parts only were yet such which alone the land would admit of.

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1. (1932) I.L.R. 56 Bom. 220.
2. (1898) 2 C.W.N. 519 : *see also* (1869) 4 M.H.C.R. App. xliv.
3. (1909) I.L.R. 36 Cal. 749.
4. (1879) L.R. 4 A.C. 770, 791.
5. (1837) 2 M. & W. 326, 331 : 150 E.R. 781.
6. (1896) I.L.R. 24 Cal. 256, 259.
7. (1903) I.L.R. 31 Cal. 397, 404, 405.
8. (1882) 8 A.C. 135, 155, 166.
9. (1892) L.R. 18 I.A. 149 : I.L.R. 15 Mad. 101 (P.C.).

EMPEROR *v.* ABDUL HAKIM, I.L.R. (1942) All. 35.

This decision is one of first impression. Section 54 (1) Criminal Procedure Code by its second clause declares that "any police officer may without an order from a Magistrate and without a warrant arrest any person having in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking". *Prima facie* it is the possession of the house-breaking implement that affords justification for the arrest and where no such possession is made out the arrest becomes illegal. There is however nothing in the wording of the clause to suggest that definite foreknowledge of or information about the possession of such implement is a condition precedent to the exercise of the power of arrest by the police officer. This conclusion is supported by the context if the wording of clause 2, is compared with that of the other clauses, like clause 1, clause 4, clause 6 or clause 7. Under clause 1, credible information or reasonable suspicion on the part of the police officer is essential; clause 4 requires that the police officer should have reasonable suspicion before he acts; clause 6, mentions the same requisite, while under clause 7 a reasonable complaint should have been made, or credible information must have been received or reasonable suspicion about the person to be arrested should exist. The non-prescription of any such element in clause 2 would suggest that possession of house-breaking implement is all that is needed to justify an arrest under that clause and that it would be immaterial whether at the time of the arrest the officer had any knowledge of or information about it. If on arrest the implement is found, the officer would be vindicated; else, the arrest would have been illegal and the officer would lay himself open to the charge of having acted recklessly or rashly or negligently. In other words where the officer acts without foreknowledge or information he will be arresting at his own risk. The construction placed on section 25 of the Madras Debt Conciliation Act may be referred to in this connection. Under that section when an application has been made to a board under section 4 any suit or other proceeding then pending before a Civil Court in respect of the debt shall not be proceeded with until the board has dismissed the application. Construing this language it has been held in *Sitaramareddi* v. *Somappa*[1], that the section does not require a knowledge of or information about the pendency of the application before the board by the Court for the proceedings before it being stopped. It is stated in the decision under review that the law does not intend "to give a license to every policeman moving about on the road to search any person at his sweet will merely upon some suspicion of his own which may have no reasonable foundation at all that the said person might have any implement of house-breaking in his possession. . . . What the law contemplates is that the police officer . . . must have definite knowledge or at least definite information that a certain person is in possession of an implement of house-breaking before putting that person under arrest". It is respectfully submitted that though the principle enunciated is unexceptionable and highly desirable from the point of view of the liberty of the citizen, still it is doubtful if it follows either from the language of the clause or from the context in which it is placed. In these circumstances it will be welcome if the clause is suitably amended by the legislature so as to set at rest any doubt which might be cast on the construction of the clause and give full effect to the principle laid down by the learned Judges in the case under notice.

RAGHUBIR SARAN DAS *v.* KUNJ BEHARI LAL, I.L.R. (1942) All. 120.

One of the questions that fell to be decided in this case was whether a conveyance by the official receiver in the exercise of his powers under the Provincial Insolvency Act will have to satisfy the requirements of section 54 of the Transfer of Property Act in regard to the sale of immovable property of the value of

1. (1943) 1 M.L.J. 402.

Rs. 100 and upwards; in other words, whether the conveyance could be made only by a registered instrument. Section 2 of the Transfer of Property Act provides that nothing contained in the Act shall be deemed to affect any transfer by operation of law or by or in execution of a decree or order of a Court of competent jurisdiction. The preamble to the Act indicates that the provisions of the Act are intended to govern only transfers of property by act of parties. The applicability of section 54 would thus depend upon the true nature of the sale by the official receiver, whether it is to be regarded as a transfer by operation of law or by or in execution of a decree or order of a Court, or as one by one private party to another. It is indisputable that property vests in the receiver by operation of law, *see* section 28 (2), Provincial Insolvency Act. Section 59 clause (*a*) clothes him with the power to sell all or any part of the property of the insolvent. This is a power which he may exercise on his own authority and without the necessity for any leave of Court. He has full discretion in the matter of selling the property, *Arman Sardar* v. *Satkhira Joint Stock Co.*[1], *Woonwalla & Co.*, v. *N. C. Macleod*[2], and no restriction whatever is placed as to the manner in which the sale is to be conducted, *Maung Tha Dun* v. *Po Ka*[3]; see also *Avanashi* v. *Muthukaruppan*[4]. It has also been recognised that the procedure relating to sales in execution of decrees under the Civil Procedure Code, does not apply to them, *Entazuddi Sheik* v. *Ram Krishna Bank*[5], *Shakar Khan* v. *Sarmukh Singh*[6], *Basava Sankaran* v. *Anjaneyalu*[7], *Mulchand* v. *Murari Lal*[8]. Examing the nature of the sale by an official receiver, in *Basava Sankaran's case*, Kumaraswami Sastri, O.C.J., observed: "It seems to me that a sale by the official receiver acting under the powers conferred by the Act and without any leave or sanction of Court being necessary stands in the same position as a sale by a person in whom property vests by law for the purpose of administration of an estate subject to such protection as the law allows to judicial officers acting in execution of their office. Though property vests in the receiver by operation of law the transfer by him is a transfer by one party to another and cannot be said to be a transfer by operation of law in favour of the vendee". Curgenven, J., added another reason. He remarked: "Such a sale is frequently a matter of discretion and so a voluntary act on the part of the receiver, as the purchase is on the part of the buyer; and although the receiver may be a public officer, the transaction is not the less an act of parties on that account. The ordinary rules relating to stamp and registration apply to such sales". Two other learned Judges, Ramesam and Venkatasubba Rao, JJ., concurred in the view that a sale by the official receiver will not fall under the exemption clause, section 2 (*d*), Transfer of Property Act. Other decisions have also reached a similar conclusion, see *Abdul Hashim* v. *Amar Krishna Saha*[9], *Kamsala Narasappa* v. *Hussain Sab*[10], *Mangali Prasad* v. *Abdur Rahman*[11]. A contrary view has been taken by Krishnan, J., in *Basava Sankaran's case*[7] where the learned Judge observed: "Sales by the official receiver are in the nature of Court sales and their validity really depends on the order of the insolvency Court vesting the property in the official receiver and thus authorising him to sell. The sale is a compulsory sale *in invitum* and the foundation of its validity is the order of Court. It is open to the Court to set aside a sale by the official receiver. The official receiver is an officer of Court and acts as such in effecting sales and not as a private individual". It is difficult to agree with this line of reasoning. Where full discretion is given to the official receiver to convey and that by public auction or by private treaty to any person the property vested in him in insolvency and no leave or sanction of Court is needed therefor and no sale certificate is issued

1. (1913) 18 C.L.J. 564.
2. (1906)) I.L.R. 30 Bom. 515.
3. (1927) I.L.R. 5 Rang. 768.
4. (1918) 34 M.L.J. 319.
5. (1919) 24 C.W.N. 1072 (1073).
6. A.I.R. 1932 Lah. 320.
7. (1926) 51 M.L.J. 529; I.L.R. 50 Mad. 135 (F.B.).
8. (1914) I.L.R. 36 All. 8.
9. (1919) I.L.R. 46 Cal. 887.
10. A.I.R. 1935 Mad. 55.
11. 1942 O.W.N. 396.

by the Court, the transaction can hardly be viewed as a sale by the Court. The ruling in the instant decision is in conformity with the decision of the majority in *Basava Sankaran's case*, on this particular matter. It is however opposed to the unanimous opinion in that case in so far as it holds that in selling the property of the insolvent the official receiver is acting as an agent of the Court.

AMAR CHAND *v.* NEM CHAND, I.L.R. (1942) All. 144.

Interesting points concerning the scope of Order 32, Civil Procedure Code generally, and of rule 7 thereof particularly, points more or less of first impression, have been discussed in this decision. It holds that the term "next friend" should not be restricted to persons filing *suits* only but that it covers any person making *applications* as well on behalf of a minor in relation to the suit although the minor was not himself one of the plaintiffs who filed the suit. It holds further that as soon as an application is filed in Court on behalf of a minor the person through whom it is filed occupies the position of the next friend and therefore comes within the scope of Order 32, rule 7, In the case under notice, there was transfer of a decree on 1st August, 1939, in favour of the minor. On 22nd August, 1939, his mother who was his natural guardian applied as his next friend for the substitution of the minor's name in the execution proceedings which had already been instituted by the original decree-holder. On 14th September, 1939, the mother entered into a compromise outside the Court with the judgment-debtor adjusting the decree. On 23rd September, 1939, orders were passed substituting the minor's name in the place of the original decree-holder in the execution proceedings and on the same day an application was put in by the judgment-debtor under Order 21, rule 2, to have the adjustment certified. The question was raised whether the compromise would bind the minor inasmuch as leave of Court had not been obtained therefor. Order 32, rule 1, provides for the next friend bringing a suit on behalf of a minor. By virtue of section 141 the same provision will rule in the case of original petitions. It is also settled law that execution petitions are but a continuation of the suit and therefore it would follow that such applications will fall within the purview of Order 32, rule 1. Should it make any difference where though the proceeding is one in execution the minor applicant is not one of the plaintiffs in the suit? Seemingly the case stands outside Order 32. In *Termes de la Ley*, it is stated that next friend "otherwise *prochaine amy* is he who appeareth in any Court for an infant who sueth any action or aideth the infant to pursue the suit". The principle has been extended and it is now laid down that law requires *every application* on behalf of an infant to be supported by a next friend who must be responsible to the Court that the application is not a wanton and improper one and to the respondent for costs, *In re Russel's Estate*[1]. It is stated in Bouvier[2] that "next friend" is one who without being regularly appointed guardian acts for the benefit of an infant. The law of India in also the same. A minor cannot of himself make or defend any application to a Civil Court[3]. Thus the term "next friend" is not confined to a person *suing* on behalf of a minor or filing an *execution* application or an *original petition* but will cover also the case of a person making application in relation to a suit in which however the minor was not a plaintiff. If this is correct, the provisions of Order 32, would then either directly or by way of analogy govern the acts of such next friend. It is now laid down that when a person who is already the legal or natural guardian of a minor acts as his next friend, then such person would become subject to the control of the Court. In *Ganesh Row* v. *Tuljaram Row*[4], the Privy Council observed: "No doubt a father or managing member of a joint Hindu family

1. 20 L.J.Ch.N.S. 384, see also Simpson, *The Law of Infants* 4th Edition, p. 293.
2. 8th Edition, Vol. 3, p. 2348.
3. Trevelyan on Minors 6th Edition, p. 253.
4. (1913) 25 M.L.J. 150; L.R. 40 I.A. 132: I.L.R. 36 Mad. 295 (P.C.).

may under certain circumstances and subject to certain conditions enter into agreements which may be binding on the minor members of the family. But where a minor is a party to a suit and a next friend or guardian is appointed to look after the rights and interests of the infant in and concerning the suit, the acts of such next friend or guardian are subject to the control of the Court . . . and he cannot do any act in his capacity as father or managing member which he is debarred from doing as next friend or guardian without leave of Court". Decisions have indeed gone to the length of suggesting that on general principles where a minor is represented in a suit by a next friend other than his natural guardian, the powers of his natural guardian to deal with the minor's interests which are involved in those proceedings are suspended and any compromise entered into by such guardian will be contrary to law, *Vijaya Ramayya* v. *Venkatasubba Rao*[1], *Gurmallappa* v. *Mullappa Martandappa*[2]. It is true that in all these cases reference is made to the minor being a plaintiff *ab initio* in the suit and the next friend as having been appointed to look after the interests of the minor in such suit. The reason behind the rule is however one of universal validity, namely, the necessity to protect the interests of the minor and the securing of his welfare. Such considerations will equally have to be regarded in a case where though the minor is not the plaintiff in the suit yet assistance on his behalf is invoked through Court. The other point laid down in the decision under notice is that by virtue of her mere application for the minor to be substituted in the place of the decree-holder transferor in the execution proceedings his mother and natural guardian became his next friend and cannot escape the responsibilities appertaining to that position under Order 32, rule 7 and that as *parens patriae* the Court will exercise jurisdiction whenever it finds it necessary in the minor's interest when once the assistance of the Court has been invited.

EMPEROR *v.* KANHAIYA LAL, I.L.R. (1942) All. 344 (F.B.).

Pointing out how in the anxiety shown to quash proceedings at the earliest possible stage the tendency is often exhibited to prefer revision applications against preliminary orders even before the facts stand fully ascertained, the Allahabad High Court has proceeded to emphasise an important rule of practice prevailing in that High Court, namely, that the Court will not take evidence in revision applications. There is no specific provision of law empowering the High Court to take evidence where the trial itself is yet to be held so as to enable it to dispose of any preliminary point, such as for instance a question as to the jurisdiction of the trial Court in regard to an alleged offence like criminal misappropriation or criminal breach of trust, where the factum of the receipt of the property, its unlawful retention or conversion and the details as to when, where and in what circumstances these things happened will all be material and will have to be ascertained before it can be asserted that the assumption of jurisdiction by the trial Court was on the face of it wrong. Under section 439, Criminal Procedure Code the High Court, may in its discretion exercise any of the powers conferred on a Court of appeal by sections 423, 426, 427 and 428. The last of these sections empowers the appellate Court, if it thinks additional evidence necessary, to take such evidence itself. It is however implicit in the section that evidence in the case has already been recorded by the trial Court inasmuch as it addresses itself only to the taking of additional evidence. It has however been pointed out that by reason of the power given to it by section 435 to send for the records of any proceeding of any inferior Court for satisfying itself of its regularity, the legislature in enumerating the powers of the High Court in revision as those of a Court of appeal is not exhaustive and that the section only enacts that among the powers possessed by the High Court are the powers of a Court of appeal and not that the

1. (1914) 30 M.L.J. 465: I.L.R. 39 Mad. 853.
2. (1919) I.L.R. 44 Bom. 574.

High Court can exercise only those powers and no more. Thus it has been held that the High Court has power to interfere in *any case* and at *any stage*, *Ramanathan Chettiyar* v. *Subramania Ayyar*[1]. There is also the provision in section 561-A that nothing in the Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice. It would thus seem that the High Court can, if it wants, exercise the power to take evidence even where no evidence has been previously recorded by the trial Court. It is however a different question whether the power will be exercised in any case. In the case of revisions against interlocutory orders the High Court will interfere only where a bare statement of the facts is sufficient to convince the High Court that the case is a fit one for interference at that stage, *Chota Lal Das* v. *Anant Prasad Misser*[2], *Madhav Bhagwant Deshmuk* v. *Emperor*[3], *S. C. Mitra* v. *Raja Kali Charan*[4] *Donlea* v. *Donlea*[5], *Kula Singh* v. *Emperor*[6]. The test to be applied is whether in the *admitted* circumstances of the case it would be a mock trial if the case is allowed to proceed, *Abdul Wali* v. *Emperor*[7]; or whether on the allegations in the complaint no criminal offence stands disclosed or whether the complaint is obviously filed *in terrorem*, *Chidambaram Chettiar* v. *Shanmugham Pillai*[8]. In *Ramanathan Chettiyar* v. *Subramania Ayyar*[1], while declining to quash the proceedings, Venkatasubba Rao, J., observed: "the allegations made in the complaint if proved will constitute the offence of misappropriation. The materials on which either side may rely have not been placed before me and I am not in a position to say that the complaint is false". Thus it is clear that in practice where an investigation of facts will be necessary to decide any question the High Court will not interfere but that it is only where on the facts alleged in the complaint it is obvious that to allow the trial to proceed will be a mockery or that the complaint is a mere abuse of the process of the Court or has been filed *in terrorem* the High Court will exercise its revisional powers to interfere with the assumption of jurisdiction by the trial Court.

RAM LAL v. GENDA, I.L.R. (1942) All. 368.

In this case the Allahabad High Court has taken a view about the effect of the addition to the terms of a usufructuary mortgage of a covenant by the mortgagor to repay the mortgage money within a specified time, which is opposed to that of some of the other Courts in this country and may require fuller consideration in the light of the decision of the Privy Council in *Lala Narsingh Partab* v. *Yaqub Khan*[9]. According to the Allahabad High Court the addition of the covenant to pay the mortgage money in the absence of any hypothecation being made or a power of sale being given will in case of default in payment by the specified date merely give rise to a right to sue for the mortgage money but not to bring to sale the mortgaged properties. Evidently the term 'hypothecation' in the context of the judgment is used in the sense of charge on the property with a right of sale, for in every mortgage by the very definition of it in section 58 (*a*) of the Transfer of Property Act an interest in specific immovable property stands transferred to the mortgagee as security for the advance made or to be made. In the course of the judgment the learned Judges observe that there was nothing in the terms of the mortgage in question to suggest that the mortgagors intended that the mortgage money might be recovered by a sale of the mortgaged property. If the decision in the case is to be understood as resting on the intention of parties it will, at any rate, be in accordance with the

1. (1925) 47 M.L.J. 373: I.L.R. 47 Mad. 722.
2. (1898) I.L.R. 25 Cal. 233.
3. A.I.R. 1925 Nag. 345.
4. (1927) I.L.R. 3 Luck. 287.
5. A.I.R. 1930 Lah. 881.
6. A.I.R. 1931 Pat. 140.
7. (1933) I.L.R. 9 Luck. 61.
8. (1937) 2 M.L.J. 878.
9. (1929) 58 M.L.J. 401: L.R. 56 I.A. 299: I.L.R. 4 Luck. 363 (P.C.).

earlier ruling of the Court in *Jafar Husen* v. *Ranjit Singh*[1], where a different result was reached concerning the intention of the parties by the application of the same test. In that case it was held that a covenant in a usufructuary mortgage-deed that the morgagee "will have the power to take back the mortgage money after the expiry of a term of seven years" was a covenant inconsistent with a usufructuary mortgage pure and simple, that it amounted to a personal covenant to repay the money and that though the mortgage-deed had not in terms provided for the recovery of the mortgage money by sale of the mortgaged property, still, the deed not being artistically drawn, the intention of the parties must be deemed to be to confer a right to realise the money by sale of the property. In a very early case of the same High Court, *Phul Kuar* v. *Murli Dhar*[2], where a usufructuary mortgage contained *inter alia* a provision "if we fail to pay the mortgage money within two years, the mortgagees shall be at liberty to recover the mortgage money in any manner they please", it was held that the mortgagee can realise the mortgage money by sale of the mortgaged property. It was in *Kashi Ram* v. *Sardar Singh*[3], that distinguishing the earlier cases as turning on their special facts the Allahabad High Court propounded almost as a rule of law that "a mere personal covenant to pay the mortgage-debt unaccompanied by a hypothecation of the property does not give a usufructuary mortgagee a right of sale. . . . The mere insertion in the document of a personal covenant on the part of the mortgagor to pay the mortgage-debt on demand cannot . . . alter the nature of the deed in other respects and change what is on the face of it a usufructuary mortgage into a mortgage of another character". That the right of sale is not to be implied merely from the personal covenant to repay has been laid down in certain other decisions as well, *Krishna* v. *Hari*[4], *Mohamed Abdullah* v. *Mohamed Yasin*[5]. In *Kamal Nayan Prasad Sinha* v. *Ram Nayan Prasad Sinha*[6], it was held that "an absolute covenant cannot be coupled with a condition that if the money be not paid within the time fixed the mortgagee would continue to be in possession and the mortgage bond will remain in force" and that in the circumstances the mortgagee will not have a right of sale. In Madras, it has been consistently held that the existence of a personal covenant by itself has the effect of conferring a right of sale. In *Ramayya* v. *Guruva*[7], a possessory mortgage-deed carried the additional covenant: "It is settled that we should pay the principal amount to you in three instalments within this period (four years). In default of payment of the principal amount within the 30th Palguna, Sarwajit, it is settled you should continue to enjoy the same for interest in the aforesaid manner from the year Sarvadhari and if the principal money is paid in the 30th Palguna of any year make over to our possession the said land, etc". It was held by Handley and Weir, JJ., that a mortgage is not a usufructuary mortgage if there is a covenant to pay the mortgage-debt, that the provision for the mortgagee continuing in possession in case of default is one extending the security beyond the prescribed period and does not take away his right *arising out of the covenant to pay,* to sue for the sale of the mortgaged property. Likewise in *Sivakami Ammal* v. *Gopala Savundara Ayyan*[8], where a deed of usufructuary mortgage contained a covenant by the mortgagor to pay the mortgage money in "Chitrai kalavadi" of 1883 and proceeded to recite: "If I fail to pay the mortgage amount in the said kalavadi, then you shall receive the said mortgage amount in the Chitrai kalavadi of whatever year I may pay it, deliver the said lands to my possession . . . and also give back the bond", the Full Bench observed: "We are clearly of opinion that the mortgage contains a covenant to pay and that *therefore* a suit for sale lies". The Madras view has been noticed in *Krishna* v.

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1. (1898) I.L.R. 21 All. 4.
2. (1879) I.L.R. 2 All. 527.
3. (1905) I.L.R. 28 All. 157.
4. (1908) 10 Bom.L.R. 615.
5. A.I.R. 1933 Lah. 151.
6. A.I.R. 1930 Pat. 152; see also *Luchmeswar Singh* v. *Mochan,* (1897) I. L.R. 24 Cal. 677.
7. (1890) I.L.R. 14 Mad. 232.
8. (1893) I.L.R. 17 Mad. 131 (F.B.).

Hari[1] and *Kanhaiya Prasad* v. *Hamidan*[2]. While the former case distinguishes the Madras decisions as resting on the terms of the documents concerned in the respective cases, the latter decision dismisses them with the remark "they do not assign any reasons for the conclusions at which the Court arrived and the opinion of the Court is merely stated categorically". The observation does not do justice to the earlier Madras decision at any rate and it is noteworthy that the two High Courts have assigned altogether different reasons for not following the Madras view. *Lala Narsingh Partab* v. *Yaqub Khan*[3], is a notable pronouncement of the Judicial Committee on this branch of the law. In that case an eight annas share in certain villages had been hypothecated in lieu of the principal money and interest and for the payment of interest possession was to be delivered to the mortgagee who was to appropriate the profits to the extent of the interest. The mortgage money was to be repaid in 35 years and if the mortgagors failed to repay the mortgage money at the appointed time the mortgagee was to have power to realise the money due by sale of the mortgaged property. The mortgage money was duly advanced but possession was not delivered. The mortgage was of the year, 1923, and the mortgagee filed a suit in May, 1924, for recovery of the money by sale of the mortgaged property and if that was not possible, for a money decree. The mortgagors contended that the mortgagee could only have a right to remain in possession for the prescribed period and that until the efflux of that period no question of exercising a right of sale can possibly arise. Holding that the mortgage in question was a combination of simple and usufructuary mortgages, and that possession not having been delivered the security had thereby become affected and therefore the right to sue for money arose under section 68, Lord Tomlin proceeded to observe: "But if the money has become payable under section 68, their Lordships are further of opinion that under section 67 a decree for sale can be made. It would indeed be a startling result of the legislation if in such a case as this where a default has been made by the mortgagors of a kind which materially affects the mortgagee's security there existed no remedy for the immediate enforcement of the mortgage". The first part of the observation makes it clear that if the money has become payable under section 68 a decree for sale of the mortgaged properties can be given under section 67. If therefore in a possessory mortgage there is added a covenant that the mortgage amount shall be repaid within a specified period or on a certain date, it would follow that in default of such payment a right to sue for the mortgage money will arise under section 68 by virtue of the covenant and that when the right to sue so accrues it will carry with it the further right of obtaining a decree for the sale of the mortgaged property.

BRIJ BEHARI GUPTA v. BUDH SEN, I.L.R. (1942) All. 421.

An interesting question of insolvency law fell to be decided in this case where it was held that a sale in execution of a decree held subsequent to the admission of a petition for adjudication as insolvent of the judgment-debtor was liable to be set aside at the instance of the receiver in insolvency unless the auction-purchaser proves good faith and that section 51 of the Provincial Insolvency Act has not in any way modified the provisions of section 28. In doing so the Allahabad High Court has dissented from the view expressed in a previous decision of that Court in *Kishan Swarup* v. *Mukandi Lal*[4], and aligned itself with the other High Courts on this matter. In the case under notice the petition for adjudication was presented and admitted on the 20th October; the property which had been previously attached was sold in execution on the 21st December. The adjudication itself was made on 21st January, and the sale was confirmed by the

1. (1908) 10 Bom.L.R. 615.
2. I.L.R. (1938) All. 714 (F.B.).
3. (1929) 58 M.L.J. 401: L.R. 56 I.A. 299: I.L.R. 4 Luck. 363 (P.C.).
4. A.I.R. 1934 All. 252.

Munsiff on that date. The validity of the sale was challenged by the official receiver. The effect of sub-sections 2 and 7 of section 28 taken together is that the whole of the property of the insolvent vests in the receiver with effect from the date of the *presentation* of the insolvency petition and under section 51 as it now stands, the date of the *admission* of the petition is the crucial date before which the assets have to be realised in order that persons other than the receiver may be entitled to the benefits of the execution. Reading the sections as a whole it will mean that the receiver will in any event be entitled to the proceeds of a sale realised after the admission of the insolvency petition but that he will be entitled even to the property if he can successfully challenge the good faith of the purchaser. The date of the admission of the insolvency petition is thus the boundary line between the rights of the auction-purchaser in execution and the receiver taking charge on adjudication. In *Kishan Swarup* v. *Mukandi Lal*[1] it was observed: "The auction-purchaser has nothing to do with the benefit of the execution and the assets realised in the course of the execution are not his concern. Section 51 undoubtedly implies that the assets . . . are the property of the receiver. . . . Now section 28 of the Act vests the property which belonged to the judgment-debtor in the receiver and section 51 vests the proceeds of selling that property in the receiver. Unless section 28 is modified by section 51 it would seem that both the property and the sale proceeds vest in the receiver when an auction sale has taken place between the date of the application and the date of the adjudication. Such a result would be anomalous". This statement is not warranted by the language of section 28. Under it the property vests in the receiver from the date of the very presentation of the insolvency petition irrespective of the dates of admission or adjudication, if the adjudication eventually happens. If therefore without notice to the receiver or independently of him any property which belonged to the insolvent is sold, no title can ordinarily pass to the purchaser because the insolvent himself would have had no longer any title to the property. If however the sale had been held before the admission of the petition the auction-purchaser stands protected as also where though the sale is after the admission of the petition the purchaser is able to show good faith. As pointed out in *Jogendranath Kundu* v. *Yajneswar Mandal*[2]: "By the operation of section 28 (7) the title of the auction-purchaser who purchases the property of the debtor after the admission of the insolvency petition but before the order of adjudication is not absolute but contingent on the insolvency application being dismissed. If the insolvency application is dismissed he gets an indefeasible title; but if the order of adjudication is made he cannot claim any title as against the receiver. An exception however has been made by the legislature in favour of purchasers in good faith in all cases".

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1. A.I.R. 1934 All. 252. *Polamma* v. *Official Receiver,* A.I.R. 1938 Mad. 718.
2. (1935) I.L.R. 63 Cal. 176, See also